

Legalism and Decisionism in Crisis

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In the years since September 11, 2001, scholars have advocated two main positions on the role of law and the proper balance of powers among the branches of government in emergencies. This Article critiques these two approaches—which could be called Legalism and Decisionism—and offers a third way. Debates between Legalism and Decisionism turn on (1) whether emergencies can be governed by prescribed legal norms; and (2) what the balance of powers among the three branches of government should be in emergencies. Under the Legalist approach, legal norms can and should guide governmental response to emergencies, and the executive branch is constrained by law in emergencies. In contrast, under the Decisionist approach, legal norms cannot respond to all emergencies, and therefore the executive branch is and should be the primary decision-maker in emergencies. Legalists emphasize the importance in emergencies of norms, and Decisionists emphasize the importance in emergencies of decisions.

This Article shows not only the disagreements between Legalism and Decisionism but also the three key political assumptions that they often share. First, they agree that emergencies trigger a necessity for security measures that may curtail civil liberties. Second, they perceive public enemies as distinct from private enemies. Third, they share the view that the primary goal of the state and its laws is the prevention of future catastrophes. This Article offers an alternative approach, which I call “Humanist Decisionism.” Humanist Decisionism departs from both Legalism and Decisionism in its attempt to replace the prevailing politics of necessity, enmity, and catastrophe with a politics of friendship and hospitality. This approach has normative implications for the desirability of the legal distinction between public and private enemies, for the level of judicial scrutiny regarding the existence of an emergency, and for the possibility of adopting political and legal measures of friendship and hospitality towards the so-called enemy.

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I. INTRODUCTION

Legalism and Decisionism are the prevailing attitudes to governance in emergencies. In the years since September 11, 2001, advocates of Legalism and Decisionism have debated the role of law and the proper balance of powers among the branches of government in emergencies. By “Decisionism” this Article means an approach that emphasizes the limits of ordinary laws and the consequent key role of the executive branch in emergencies. “Legalism,” by contrast, is an approach that maintains that ordinary norms can and should govern in emergencies and that *all three branches* of government must participate in the decision-making process in emergencies.

In U.S. emergency-powers debates, the position associated with executive power is sometimes called “deferential” or “executive unilateralism.” In contrast, the position associated with the rule of law is sometimes called “civil libertarian” or “civil libertarian idealism.”¹ However, this taxonomy is deficient because it creates an odd asymmetry. The terms “deferential” and “executive unilateralism” mark the proposed institutional decision-maker in emergencies (the executive branch), whereas the term “civil libertarian” emphasizes legal substance (civil liberties). This taxonomy confusingly sets up the debate as one between actors and values. Emergency-powers debates are better understood as debates between Legalism and Decisionism.

Debates between Legalism and Decisionism turn on two main issues: (1) whether emergencies can be governed by prescribed legal norms that apply in ordinary times; and (2) how the balance of power among the three branches of government should operate in emergencies. The gist of Decisionism is that in extraordinary emergency situations ordinary laws are inadequate, and the executive branch must step up and act. Legalists disagree. They focus on the importance of the rule of law, and underscore that all three branches of government are bound by law in emergencies.²

¹ See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 15–18 (2007); Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States’ Constitutional Approach to Rights During Wartime*, 2 INT’L J. CONST. L. 296, 296–97 (2004) (contrasting “executive unilateralism” with “civil libertarian idealism”).

² For the sources of my distinction between Legalism and Decisionism, see CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 3 (George Schwab ed., Univ. Chi. Press 2005) (1922) [hereinafter SCHMITT, *POLITICAL THEOLOGY*] (“The pure normativist thinks in terms of impersonal rules, and the decisionist . . . by means of a personal decision . . .”); Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147, 1163 (2001) (“What makes the thinker a decisionist is not that he has a global or ontological critique of justificatory closure, but that, after

The mapping of Legalism and Decisionism offered here is necessary but difficult. Disputes between these two positions are not new. There have long been different versions of each, and they have at times made important concessions to each other. For example, as we will later see, the Decisionist argument in favor of executive acts *outside* the law (often understood in terms of absolute power) has long been normalized by saying that it is *permitted by law*.³ And on the other hand, some Legalist positions have historically accepted the exercise of extra-legal power *under the important condition that the law does not legitimize it*.⁴ Nonetheless, the Article argues that it is helpful to identify Legalism and Decisionism as two competing sets of intuitions and arguments that are currently at odds in emergency-powers debates.

Despite significant differences between Legalism and Decisionism, the Article ultimately argues that they have more in common than it might seem. Legalism and Decisionism often share three key political assumptions that are frequently overlooked. First, they are in agreement that emergencies trigger a necessity for security measures that may curtail civil liberties. Second, they perceive public enemies as distinct from private enemies. Third, they share a vision of the future as a time when great catastrophes may occur and thus attempt to tailor their approaches to prevent these future catastrophes.

Can we articulate an approach to law's response to emergencies that does not share these assumptions of necessity, enmity, and catastrophe? I argue that we can, and that it is our responsibility to do so. I offer a third approach that I call "Humanist Decisionism." This approach is humanist in that it

coming upon a situation of choice where governing norms contradict one another or 'run out,' he refuses the enterprise of either repairing the discourse or replacing it with a new discourse that will be more determinate.").

³ For an illuminating discussion of the history of the idea of the sovereign's absolute power see PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 48–49 (2008).

⁴ In the Revolutionary War Era, for example, such state departures from law were sometimes legitimized through this type of reasoning. *See, e.g., Report of the Committee of the Council of Censors*, 7 (Bailey ed., Phila. 1784) ("[I]n some instances, it is certainly true, that the Constitution has been invaded through necessity in times of extreme danger, when this country was involved in a very unequal struggle for life and liberty; and when good men, were induced to hazard all consequences, for the sake of preserving our existence as a people. Yet in a calm review of these proceedings, we think it proper to advert even to such breaches of the Constitution, as have been occasioned by the extremest necessity; least they should be brought into precedent, when no such necessity shall exist."); *see also* Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1920 n.331 (2009) (citing a 1779 Pennsylvania statute that was "particularly candid about its lawlessness," and explaining that "[i]nstead of lawfully suspending habeas, this sort of statute unlawfully suspended a wide range of other laws, including constitutional guarantees of judicial process"). I thank Philip Hamburger for calling my attention to the pamphlet cited in this note.

values the freedom needed for human flourishing, as do many Legalist approaches, but it is Decisionist in that it recognizes the limits of legal norms and the need for intuition-based decision-making in some situations. Humanist Decisionism departs from both Legalism and Decisionism in its attempt to replace the current prevailing politics of necessity, enmity, and catastrophe shared by Legalism and Decisionism with a politics of friendship and hospitality.

This Article proceeds as follows: Parts II and III elaborate the main premises of Legalism and Decisionism in the context of emergency-powers debates. Part IV examines three contemporary sites of Legalist and Decisionist disputes: (1) “enemy combatant” detentions and the entitlement to habeas corpus relief; (2) the meaning of the Suspension Clause; and (3) the Cybersecurity Act of 2009, pending legislation that attempts to secure cyberspace in times of emergency. Part V discusses the shared political assumptions of Legalism and Decisionism. Part VI presents the main premises of Humanist Decisionism and concludes with several normative implications.

II. U.S. LEGALISM

The Legalist approach to emergency powers contends that (1) emergencies can and should be governed by pre-determined legal norms (hereinafter “rule of law”⁵); and (2) the executive branch, along with the other two branches, is constrained by law in emergencies.⁶

A. Supremacy of Law in Emergencies

Can the Constitution and other legal norms adequately guide governmental responses to emergencies? The events of September 11, 2001 have triggered a lively and fascinating debate regarding the usefulness of pre-determined legal norms (including the Constitution) in the management of emergencies.⁷ The jurisprudential dispute turns on whether emergencies, due

⁵ The term “rule of law” has many other meanings and has generated substantial literature in several areas of legal scholarship, including jurisprudence. A *locus classicus* is Joseph Raz, *The Rule of Law and its Virtue*, 93 L.Q. REV. 195 (1977), reprinted in READINGS IN THE PHILOSOPHY OF LAW 13 (Keith Culver ed., 1999).

⁶ Some scholars may accept the first premise of Legalism but not the second. But most Legalists accept both premises, and thus the usual form of Legalism is considered here.

⁷ See generally David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003); David Dyzenhaus, Schmitt v. Dicey: *Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005 (2006); Oren Gross, *Chaos and Rules: Should Responses to*

to their unique, unpredictable, and dangerous nature, trigger situations to which ordinary legal norms *cannot* properly respond. I call this question “jurisprudential” because its primary focus is on the nature of legal norms. In other words, the question is not which branch of government should respond to emergencies or whether the executive is bound in emergencies. (These related issues are discussed separately below.) Rather, the question here is whether emergencies actually challenge the very idea of the “rule of law.” Does law “run out” in emergencies? Can the governmental response to emergencies be meaningfully guided by pre-existing legal norms?

The Legalist answer is yes. The response to emergencies must come from *within the law*. However, there is a spectrum of Legalist positions regarding what it actually means to respond to emergencies from within. Is it enough that Congress passes a law that endorses executive action? Or is there a deeper notion of legality that a democratic legal system should aspire to in emergencies?

While all Legalist approaches agree that the response to emergencies must come from within the legal order, some Legalist positions have conceded that emergencies are indeed unique situations that must trigger specifically-tailored alternative legal regimes.⁸ Other Legalist positions disagree and posit that the ordinary legal order is adequately equipped to respond to emergencies. These approaches emphasize a “*substantive* conception of the rule of law that is appropriate at all times.”⁹ David Dyzenhaus, for example, argues that mere Congressional approval of executive acts often falls short of a meaningful enforcement of the rule of law. He argues that Congress itself should also be bound by a thick, substantive concept of law.¹⁰

Most Legalist positions agree that seepage from emergencies to normal

Violent Crises Always Be Constitutional?, 112 YALE L.J. 1011 (2003); Jenny S. Martinez, *Process and Substance in the “War on Terror”*, 108 COLUM. L. REV. 1013 (2008); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47 (2004); Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 306 (2003).

⁸ See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1030 (2003); Gross, *supra* note 7, at 1023.

⁹ Dyzenhaus, *supra* note 7, at 2037 (emphasis added). I have elsewhere explained the excellent distinction offered by David Dyzenhaus between “rule of law” and “rule by law.” See Noa Ben-Asher, *Legal Holes*, 5 UNBOUND: HARV. J. LEGAL LEFT 1, 15 (2009) (“[Legalist approaches] have accordingly articulated a helpful distinction between ‘rule by law’ and ‘rule of law.’ The former typically refers to a situation in which the legislature serves as a rubber stamp for executive action, and the latter—to a more robust version of legality that maintains the core principles [of] the legal system. Congress might authorize a variety of state actions that contradict basic principles of the legal system.”).

¹⁰ Dyzenhaus, *supra* note 7, at 2037.

times is among the serious dangers of extraordinary responses to emergencies:

[A]n exceptional legal regime—alongside the ordinary one—. . . will permit government to claim that it is acting according to law when it in effect has a free hand and will, the longer the exceptional regime lasts, create the problem of seepage of government outside of the rule of law into the ordinary legal order.¹¹

Seepage from emergencies to normal times results from the fact that “bright-line demarcations between normalcy and emergency are all too frequently untenable, and distinctions between the two made difficult, if not impossible.”¹² Accordingly, “there is a strong probability that measures used by the government in emergencies will eventually seep into the legal system even after the crisis has ended.”¹³ In addition, “[e]mergency regimes tend to perpetuate themselves, regardless of the intentions of those who originally invoked them. Once brought to life, they are not so easily terminable.”¹⁴ Legalists thus conclude that there is no place for extraordinary responses to emergencies outside of the ordinary legal order.¹⁵

Consequently, Legalists have argued that what has come to be known as “grey and black holes” should be eliminated from the legal system. Black holes “arise when statutes or legal rules ‘either explicitly exempt[] the

¹¹ *Id.* at 2029.

¹² Gross, *supra* note 7, at 1022.

¹³ *Id.* at 1097.

¹⁴ *Id.* at 1073. For example:

The State of Israel has been under an unremitting emergency regime since its establishment in May 1948. . . .

Similarly, when originally enacted by the British Parliament, the Civil Authorities (Special Powers) Act (Northern Ireland) of 1922 was meant to last for no more than one year. . . . Subsequently, the Act was made permanent. The story of the series of Prevention of Terrorism (Temporary Provisions) Acts (PTA) was much the same. Originally introduced in Parliament in 1974, it was amended in 1975 and 1983, and reenacted in 1984. In 1989, the PTA became a permanent part of the statute books of the United Kingdom. Northern Ireland itself has been the subject of an emergency rule for a combined period of some thirty years.

Last, by the mid-1970s, the United States had experienced four declared states of emergency in force spanning a period of more than forty years. As a direct result, more than 470 pieces of legislation, meant to apply only when a state of emergency has been declared, could have been used by the government.

Id. at 1073–75 (citations omitted).

¹⁵ Dyzenhaus, *supra* note 7, at 2029. We will later see that Gross offers a different solution to the seepage problem from the one offered by Legalists. See *infra* Part II.B.

executive from the requirements of the rule of law or explicitly exclude[] judicial review of executive action.”¹⁶ And grey holes, in the context of executive detention, are “space[s] in which the detainee has some procedural rights but not rights sufficient for him effectively to contest the executive’s case for his detention.”¹⁷ Some Legalists view grey holes as more harmful than black holes “because the procedural rights available to the detainee cloak the lack of substance. . . . A little bit of legality can be more lethal to the rule of law than none.”¹⁸ In other words, because law is not completely absent in grey holes, a façade of legality is preserved.¹⁹ Dyzenhaus has correctly identified the German legal theorist, Carl Schmitt, as the twentieth-century source of the idea of grey and black holes.²⁰ I will return to this issue in Part III.

Another Legalist argument for a thick, substantive notion of the rule of law in emergencies has been articulated by Jenny Martinez. She writes,

[W]hen multiple decisions from the “war on terror” are put together . . . one begins to sense that something noteworthy is afoot. *All* of the U.S. Supreme Court decisions in the terrorism cases thus far have been focused on questions of process, as have a great many of the lower court decisions.²¹

Martinez continues,

[T]he “war on terror” litigation in U.S. courts has been fixated on process to a degree that is peculiar in both senses of that word—that is, there is a pattern of focus-on-procedure-while-sidestepping-substance that is *odd* enough to require explanation—and there is something *particular* about

¹⁶ Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096 (2009) (taking these terms from DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 3 (2006)); Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1, 1 (2004)).

¹⁷ Dyzenhaus, *supra* note 7, at 2026.

¹⁸ *Id.*

¹⁹ *Id.* at 2029.

²⁰ *Id.* at 2006.

²¹ Martinez, *supra* note 7, at 1015–16 (emphasis in original); see also Owen Fiss, *The War against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 244–46 (2006) (arguing for more Supreme Court involvement in constitutional questions of individual liberty). But see Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661, 663 (arguing that in a number of post-9/11 decisions courts have put procedural devices to “surprisingly ‘muscular’ uses,” and that these decisions “illustrate a rare but critical assertion of procedural law where the political branches fail to legislate or properly implement substantive law”).

American legal culture at this moment in time that provides at least part of that explanation.²²

Martinez criticizes the judicial side-stepping of substance, arguing that “the focus on process rather than substance comes at a human cost,”²³ and that “the ‘war on terror’ litigation thus far seems to have resulted in a great deal of process, and not much justice.”²⁴

Notably, the Legalist claim that “[t]he Constitution can and does apply in times of strife as well as peace, when the courts are open and when they are not,”²⁵ does not necessarily mean that the Constitution applies *in the same way* at all times. As Trevor Morrison has argued, “Civil War precedents may be a fruitful source of constitutional lessons for other emergency circumstances. In particular, they may help us see that national emergencies can warrant certain constitutional arrangements we would not otherwise tolerate.”²⁶ So, although the Constitution applies at all times, in national security emergencies a shift occurs in the balance between national security and liberties.

In sum, Legalist positions agree that responses to emergencies should come from within the law, either through existing Constitutional norms or by the enactment of special emergency legislation. We will later see that Decisionist approaches critically disagree with both of these Legalist alternatives. Decisionists challenge Legalism by arguing that some emergencies cannot and should not be regulated by statutory or constitutional norms because they fall within the exceptional realm of executive decision-making.

B. No Executive Branch Supremacy in Emergencies

The Legalist position regarding balance of powers is that “[t]he constitutional text requires members of Congress, the President, and all other executive officials to pledge to uphold the Constitution. The duties thus generated do not depend on judicial enforcement.”²⁷ And although much of the decision-making in emergencies is executed by government officials outside the courts, Legalists have also emphasized that courts must play a

²² Martinez, *supra* note 7, at 1016.

²³ *Id.* at 1017.

²⁴ *Id.* at 1092.

²⁵ Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1616 (2007).

²⁶ *Id.* at 1589.

²⁷ *Id.* at 1580 (citation omitted).

central role in interpreting the Constitution.²⁸ In other words, the Legalist position is that “legislative and executive branch fidelity to the Constitution includes, but is not limited to, *complying with judicial determinations of unconstitutionality* and, more generally, that the political branches should take some account of judge-made constitutional doctrine when construing the Constitution themselves.”²⁹

Some Legalist approaches have prescribed robust judicial review of executive decision-making. For example, David Cole writes:

It is in times of crisis that constitutional rights and liberties are most needed, because the temptation to sacrifice them in the name of national security will be at its most acute. To government officials, civil rights and liberties often appear to be mere obstacles to effective protection of the national interest. . . . Judicial protection is also critical because crisis measures are typically targeted at the most vulnerable among us, especially noncitizens, who have little or no voice in the political process.³⁰

The protection of civil liberties in emergencies, according to Cole, should not be left in the hands of the political branches. Were courts to adopt the position that “extraconstitutional measures are appropriate during emergencies, and that the only real check is political, much would be lost and little gained in the protection of civil liberties.”³¹ Thus, although “courts are undoubtedly highly imperfect[,]” writes Cole, “the alternatives are worse. One cannot rely on the executive branch to police itself in times of crisis.”³²

And while some Legalist approaches have prescribed robust judicial review in times of crisis, others have focused on legislative authorization of executive acts as the key to legitimacy. Geoffrey Stone, for example, has pointed out in the context of the Foreign Intelligence Surveillance Act (FISA) that “the proper way—the legal way, the constitutional way—for the President to address that question [of how to engage in more aggressive foreign surveillance than FISA permits] is for him to go to Congress and seek an amendment to FISA.”³³ Likewise, Stone writes regarding the seizing and

²⁸ *Id.* at 1582 (“Still, our constitutional traditions do call for preserving *some* central role for the judiciary in constitutional interpretation. Recognizing that, courts and scholars commonly regard constitutional interpretation as ‘a collaborative enterprise in which each branch . . . recognize[s] its own limitations and the relative strengths and functions of the other coordinate branches,’ but still accord the Supreme Court the final say in the constitutional disputes that come before it.” (citations omitted)).

²⁹ *Id.* (emphasis added).

³⁰ Cole, *supra* note 7, at 2567 (citation omitted).

³¹ *Id.* at 2587.

³² *Id.* at 2591.

³³ Geoffrey Stone, *Federalism: Executive Power in Wartime*, 5 GEO J.L. & PUB.

detaining of José Padilla at O'Hare airport in Chicago:

[I]f the President wanted the power to do this, if he thought that the circumstances facing the United States were so dire that he needed the authority secretly to seize American citizens . . . then he could have gone to Congress and said 'I want this power.' Congress could then have decided whether it was an appropriate power, and eventually the Court could have decided whether that power violated due process.³⁴

Others have also stressed the importance of the joint work of the political branches in emergencies, arguing that judges do and should defer when the political branches have worked in unison in emergency national security matters. For example, Samuel Issacharoff and Richard Pildes have argued that

[c]ourts have developed a process-based, institutionally oriented (as opposed to rights oriented) framework for examining the legality of governmental action in extreme security contexts. Through this process-based approach, American courts have sought to shift the responsibility for these difficult decisions away from themselves and toward the joint action of the most democratic branches of government.³⁵

Although the positions discussed above vary—especially in their emphasis on judicial review in times of crisis—what makes all of them Legalist for the purposes of this Article is that they all reject the Decisionist claims that certain emergencies must fall completely outside the “rule of law” and that the Legislature and the Judiciary must defer to the executive branch in emergencies.

III. U.S. DECISIONISM

In the years that followed the events of September 11, 2001, a

POL'Y 309, 323 (2007).

³⁴ *Id.*

³⁵ Samuel Issacharoff & Richard Pildes, *Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime*, 2 INT'L J. CONST. L. 296, 297 (2004); see also Trevor Morrison, *The Middle Ground in Judicial Review of Enemy Combatant Detentions*, 45 WILLAMETTE L. REV. 453, 456 (2009) (There is a “middle approach that eschews conclusive constitutional judgments in either direction. It neither categorically forbids certain government actions as violative of the Constitution's individual rights provisions nor upholds such actions on theories of unilateral, preclusive, executive power derived directly from the Constitution. Instead, this approach encourages the legislative and executive branches to work together to decide how best to balance liberty and security in times of national crisis, and substantially defers to them when they do.”).

Decisionist approach crystallized in U.S. emergency-powers debates. The two main jurisprudential premises of this approach are that: (1) emergencies cannot be governed by the rule of law; and (2) the primary decision-maker in emergencies is the executive branch. The main normative consequence of these two claims is that courts and legislators do and should defer to the executive branch in emergencies. This Part has three Sections. Section A introduces the source of these Decisionist premises: the German legal theorist Carl Schmitt. Sections B and C demonstrate how Schmitt's jurisprudential claims about emergency powers have reappeared in contemporary U.S. debates.

A. Background

The predecessor of U.S. Decisionism is the German legal scholar, Carl Schmitt,³⁶ who is often referred to as the father of twentieth-century legal Decisionism.³⁷ Schmitt was a law professor and a public-law theorist who wrote extensively in the years of the Weimar Republic (1918–1933) and thereafter. Various scholars have acknowledged the relevance of Carl Schmitt in contemporary emergency-powers debates.³⁸

What this Article adds to this discussion are the following two insights. First, we must distinguish between Carl Schmitt's jurisprudence and his politics. Schmitt, his current supporters, and many of his past and current opponents have, for the most part, conflated these two aspects of his thinking. Part VI will argue that this conflation of politics and jurisprudence has been a wise move for Schmitt and his current followers, and an unfortunate one for his opponents. Second, this Article claims that current Schmittians have conveniently dropped Schmitt's more controversial claims or those claims that would be unpopular in current U.S. legal-academic discourse. They claim to have stripped Schmitt of "layers of interpretive dross and continental conceptualisms,"³⁹ and kept only his "important mid-sized and largely institutional or empirical insights."⁴⁰ Section C of this Part identifies one of these "continental conceptualisms"—Schmitt's definition of

³⁶ Dyzenhaus, *supra* note 7, at 2006–07; Vermeule, *supra* note 16, at 1089–99.

³⁷ See Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy*, 21 CARDOZO L. REV. 1825, 1826 (2000).

³⁸ David Abraham, *The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights*, 62 U. MIAMI L. REV. 249, 263–65 (2008). See generally Dyzenhaus, *supra* note 7; Vermeule, *supra* note 16.

³⁹ Vermeule, *supra* note 16, at 1100.

⁴⁰ *Id.* at 1100–01.

sovereignty—and argues that it cannot be easily “cleaned off”⁴¹ of Schmitt’s insights.⁴²

Schmitt contended that decisions are superior to norms.⁴³ He claimed that while “[e]very jurisprudential thought works with rules, as well as with decisions . . . only one of these can be the ultimate jurisprudentially formed notion from which all the others are always juristically derived: either norm . . . , or decision, or concrete order.”⁴⁴ And for the Decisionist, Schmitt tells us, “[w]hat matters for the reality of legal life is *who decides*.”⁴⁵ This is the core of Schmittian Decisionism. According to Schmitt, while the Legalist seeks the ideal of “substantive correctness,” the Decisionist raises “the question of competence.”⁴⁶ This means that the important question for the Decisionist is not what the correct legal answer is, but which political actor is best situated to decide how to act in any given situation. The key concepts here are decision, competence, and concrete situations.

One of the main justifications for the superiority of decisions over norms, under this view, is that “norms are valid only for normal situations, and the presupposed normalcy of a situation is the positive-legal component of its ‘validity.’”⁴⁷ Schmitt insisted that “no norm can be valid in an entirely abnormal situation.”⁴⁸ The norm, according to Schmitt, cannot address all situations, and when it attempts to do so, “[i]t becomes senseless and unconnected.”⁴⁹ The norm controls the situation “only so far as the situation has not become completely abnormal.”⁵⁰ Consequently, “[b]ecause a general norm, as represented by an ordinary legal prescription, can never encompass a total exception, the decision that a real exception exists cannot therefore be entirely derived from this norm.”⁵¹

⁴¹ *Id.* at 1100.

⁴² Elsewhere I have argued that Schmitt’s utilization of theistic structures is also critical for our current understanding of emergency powers. See Ben-Asher, *supra* note 9, at 3.

⁴³ CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 67 (George Schwab trans., Univ. Chi. Press 2007) (1932) [hereinafter SCHMITT, *THE CONCEPT OF THE POLITICAL*].

⁴⁴ CARL SCHMITT, *ON THE THREE TYPES OF JURISTIC THOUGHT* 43 (Joseph W. Bendersky trans., Praeger Publishers 2004) (1934).

⁴⁵ SCHMITT, *POLITICAL THEOLOGY*, *supra* note 2, at 34 (emphasis added).

⁴⁶ *Id.*

⁴⁷ CARL SCHMITT, *LEGALITY AND LEGITIMACY* 69 (Jeffrey Seitzer ed., trans., Duke Univ. Press 2004) (1932).

⁴⁸ SCHMITT, *POLITICAL THEOLOGY*, *supra* note 2, at 46.

⁴⁹ SCHMITT, *THE CONCEPT OF THE POLITICAL*, *supra* note 43, at 56.

⁵⁰ *Id.*

⁵¹ SCHMITT, *POLITICAL THEOLOGY*, *supra* note 2, at 6.

But if norms cannot govern a “real exception,” then who can? Schmitt’s infamous answer is that the “[s]overeign is he who decides on the exception.”⁵² To counter the Legalist assumption that law is sovereign at all times (the rule-of-law principle), Schmitt claimed that whoever is authorized within a legal order to declare a “real exception” is the true sovereign.⁵³ And Schmitt viewed emergencies as the ultimate exception “that makes relevant the subject of sovereignty, that is, the whole question of sovereignty.”⁵⁴ Emergencies are truly exceptional because “[t]he precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated.”⁵⁵ That is, whoever is authorized to declare an emergency and decide how to respond to it, is the real (Schmittian) sovereign. Thus, the declaration of the emergency is the core of politics and the mark of sovereignty.

The sovereign declares that an emergency exists and decides how to act in it because the role of the state, according to Schmitt, consists above all “in assuring total peace within the state and its territory.”⁵⁶ Hence “the lawmaker under normal circumstances is something different than the special commissioner of the abnormal situation who reestablishes normalcy”⁵⁷ And constitutional protections should not apply in emergencies because the Constitution is only “the expression of the societal order, the existence of society itself. As soon as it is attacked the battle must then be waged *outside the constitution and the law*, hence decided by the power of weapons.”⁵⁸

B. *Extra-Legality in Emergencies*

Current Decisionist theories have taken up Carl Schmitt’s theories to challenge the notion that the rule of law is applicable at all times. Adrian Vermeule, for example, explicitly uses Schmitt’s insights to argue that U.S. administrative law has “built right into its structure, a series of legal ‘black holes’ and ‘grey holes.’”⁵⁹ Based on a study of post-September 11 appellate

⁵² *Id.* at 5.

⁵³ *Id.* at 6.

⁵⁴ *Id.*

⁵⁵ *Id.* at 6–7.

⁵⁶ *Id.* at 46.

⁵⁷ SCHMITT, THE CONCEPT OF THE POLITICAL, *supra* note 43, at 69; *see also* SCHMITT, POLITICAL THEOLOGY, *supra* note 2, at 46 (“Every norm presupposes a normal situation, and no norm can be valid in an entirely abnormal situation.”).

⁵⁸ SCHMITT, POLITICAL THEOLOGY, *supra* note 2, at 47 (emphasis added) (quoting Lorenz von Stein, *Geschichte Der Sozialen Bewegung*, in FRANKREICH I, DER BERGRIFF DER GESELLSCHAFT 494 (Munich, Drei Masken Verlag 1921)).

⁵⁹ Vermeule, *supra* note 16, at 1096 (citations omitted). For definitions of grey and

decisions involving matters of national security, Vermeule argues that “quite ordinary administrative law doctrines, such as ‘arbitrary and capricious’ review of agency policy choices and factual findings, function as grey holes during times of war and real or perceived emergency.”⁶⁰ These administrative law doctrines are “grey holes” in the sense that they “represent adjustable parameters that courts can and do use to dial up or dial down the intensity of judicial review, as wars, security threats and emergencies come and go.”⁶¹ “Grey holes,” according to Vermeule, are significantly different from “black holes” in that “even when the parameter is adjusted down near zero—even when the intensity of review is very weak—the façade of lawlikeness is preserved.”⁶²

However, and this is the essence of U.S. Decisionism, “grey and black holes” are not only integral to administrative law, “[i]ndeed they are inevitable; no legal order governing a massive and massively diverse administrative state can hope to dispense with them, although their scope will wax and wane as time and circumstances dictate.”⁶³ Vermeule argues that grey and black holes demonstrate the Schmittian insight that because “[e]mergencies cannot realistically be governed by *ex ante*, highly specified rules, but at most by vague *ex post* standards[,] it is beyond the institutional capacity of lawmakers to specify and allocate emergency powers in all future contingencies.”⁶⁴ Vermeule therefore critiques “[t]heorists of the thick rule of law,” who are “wrong in thinking that anything can be done about this state of affairs.”⁶⁵ Rather, “we should recognize that the APA and its accumulated doctrines and practices are, and always will be, our Schmittian administrative law.”⁶⁶ Therefore:

[P]ractically speaking, legislators in particular will feel enormous pressure to create vague standards and escape hatches—for emergencies and otherwise—in the code of legal procedure that governs the mine run of ordinary cases in the administrative state, because legislators know they cannot subject the massively diverse body of administrative entities to tightly specified rules, and because they fear the consequences of lashing the executive too tightly to the mast in future emergencies.⁶⁷

black holes, see *supra* notes 16, 17 and accompanying text.

⁶⁰ *Id.* at 1118.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1149.

⁶⁴ *Id.* at 1101.

⁶⁵ Vermeule, *supra* note 16, at 1149.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1101.

The allusion to Odysseus in the last sentence is a noteworthy inversion of the epic story. In Vermeule's telling, tying the executive to the mast may cause or exacerbate future disasters. In Homer's telling, Odysseus's being tied to the mast enabled him to avoid the disaster of being lured to his death.⁶⁸

More importantly, it is critical to see here that in this clever theoretical move Decisionism *legalizes extra-legality*: it founds unbound executive power not in the executive itself but in a *legislative act* by Congress. Vermeule claims that deference to the executive in emergencies through "grey and black" holes was set up by Congress in the APA and is therefore legal. The term "black and grey holes" is preceded by the word "legal" throughout his text to signal that these are not just holes in a legal system—these are *legal* holes in a legal system.⁶⁹ So although black holes "exempt the executive from the requirements of the rule of law,"⁷⁰ and grey holes are disguised black holes,⁷¹ the text underscores that these lawless holes are "legal." Grey and black holes under this Decisionist view are therefore better understood as law's self-suspending mechanisms.⁷²

Mark Tushnet and Oren Gross have also taken the position that the rule of law recedes in emergencies. Under Gross's "Extra-Legal Measures Model,"⁷³ public officials may respond extra-legally to emergencies if they "believe that such action is necessary for protecting the nation and the public in the face of calamity, provided that they openly and publicly acknowledge the nature of their actions."⁷⁴ Gross argues that publicity may provide more transparency and the uncertainty of the outcomes may limit public officials' temptation to act hastily.⁷⁵ Likewise, Mark Tushnet has argued for an

⁶⁸ I thank Kent McKeever for bringing this point to my attention.

⁶⁹ For further elaboration of this point, see Ben-Asher, *supra* note 9, at 1–3.

⁷⁰ *Id.* at 1.

⁷¹ *Id.*

⁷² See GIORGIO AGAMBEN, *STATE OF EXCEPTION* 1, 1–2 (Kevin Attell trans., 2005); Dyzenhaus, *supra* note 7, at 2006 ("One curious feature of states of emergency is that they are brought into being by law."); David Dyzenhaus, *The Compulsion of Legality, in EMERGENCIES AND THE LIMITS OF LEGALITY* 33 (Victor V. Ramraj ed., 2008).

⁷³ Gross, *supra* note 7, at 1097. Gross bases his model on three propositions: (1) emergencies create a need for extraordinary responses (i.e., Carl Schmitt's theory of the emergency); (2) historically, constitutional considerations have not significantly constrained governments in cases of emergencies; and (3) there is a strong probability that measures used by the government in emergencies will eventually seep into the legal system even after the crisis. *Id.*

⁷⁴ *Id.* at 1023, 1111–15. Public officials should also be required to disclose the nature of their activities and hope for "ex post" judicial, executive, or legislative ratification.

⁷⁵ OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 155–56 (2006); Gross, *supra* note 7, at 1123–25.

affirmative recognition of extraconstitutional emergency powers; Tushnet writes that “it is better to have emergency powers exercised in an extraconstitutional way, so that everyone understands that the actions are extraordinary, than to have the actions rationalized away as consistent with the Constitution and thereby normalized.”⁷⁶

Notably, what this Article calls U.S. Decisionism is different from what Cass Sunstein has called the “minimalist approach.” Although both minimalism and Decisionism agree that judges should play a minimalist role in emergencies, they significantly diverge on the ultimate decision-maker in emergencies. The minimalist approach recognizes that the Constitution “does not give a general ‘war power’ to the President” and that “[w]ith respect to war, the Constitution is easily read to give *the national legislature the primary role*.”⁷⁷ In contrast, the Decisionist approach views the President and the executive branch as the primary decision-makers in emergencies.⁷⁸ So whereas both minimalism and Decisionism argue for a limited role for courts in emergencies, minimalism is still Legalist in the sense that it places the ultimate authority in the legislature, whereas Decisionism places the ultimate authority in the realm of executive decision.

C. Executive Branch Supremacy in Emergencies

Current Decisionist scholars have consistently repeated the argument that courts and legislators do and should defer to the President and the executive branch in emergencies. Under this view, the President and the executive branch are, and should be, the primary decision-makers in national security emergencies. Thus, some current Decisionists self-identify as “deferentialists.”⁷⁹ They have generally argued that in reality “courts defer heavily to government in times of emergency, either by upholding government’s action on the merits, or by ducking hard cases that might require ruling against the government.”⁸⁰

⁷⁶ Tushnet, *supra* note 7, at 306.

⁷⁷ See Sunstein, *supra* note 7, at 109 (“National Security Maximalism neglects institutional factors that create a grave risk that the executive branch will support unjustified intrusions on civil liberties. Group polarization is a significant danger, particularly for a branch specifically designed to consist of like-minded people. As a result, the executive might well support interferences with freedom that are not adequately justified by security concerns. This is especially likely if those interferences affect identifiable groups rather than the public as a whole.”).

⁷⁸ See, e.g., Eric A. Posner & Adrian Vermeule, *Originalism and Emergencies: A Reply to Lawson*, 87 B.U. L. REV. 313, 314 (2007) (“[B]ut to whom is that deference owed? Congress or the President? On our theory, the answer is the President.”).

⁷⁹ *Id.*

⁸⁰ POSNER & VERMEULE, *supra* note 1, at 16.

1. *Three Justifications for Deference to the Executive Branch*

Decisionists have offered three different types of justifications for deference to the executive branch in emergencies: institutional competence, epistemic deference, and historical precedent. I will briefly discuss each.

First, Decisionists argue that deference shows that “[l]egislators and judges understand that the executive’s comparative institutional advantages in secrecy, force, and unitariness are all the more useful during emergencies, so that it is worthwhile transferring more discretion to the executive even if it results in an increased risk of executive abuse.”⁸¹ In other words, “the real cause of deference to government in times of emergency is *institutional*: both Congress and the judiciary defer to the executive during emergencies because of the executive’s institutional advantages in speed, secrecy, and decisiveness.”⁸² In contrast to courts and legislators who cannot properly respond to emergencies, the government is a speedy, secret, and decisive actor. Judges and legislators may also “lack confidence—and may be right to lack confidence—that they know enough about the consequences of particular measures taken for the protection of national security to be able to strike a proper balance.”⁸³ Judges are “not experts on national security in general or the terrorist threat in particular.”⁸⁴ Judges are institutionally inferior decision-makers in national security emergencies because “the judiciary, unlike the executive and legislative branches, has no machinery for systematic study of the problem,”⁸⁵ and because judges are generalists, meaning that “[c]ases involving national security are only a tiny part of their docket. They cannot afford to devote much time to them.”⁸⁶

The second justification for deference to the executive branch is “epistemic.” “Epistemically humble judges,” write Vermeule and Eric

⁸¹ Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 893 (2007); see also Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1750 (2007) (“[I]ndeed, one does see particularly robust examples of deference at both the district- and circuit-court levels in national-security-related cases during this period.”).

⁸² POSNER & VERMEULE, *supra* note 1, at 16 (emphasis added).

⁸³ RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 35 (Geoffrey R. Stone ed., 2006).

⁸⁴ *Id.*

⁸⁵ *Id.* at 35–36 (“Its staffs are small. It has to wait until it has a case to begin its inquiry into the facts and policy ramifications, and the pressure of its caseload requires it to decide the case without being able to take the time to study background and circumstances and likely consequences.”).

⁸⁶ *Id.* at 36.

Posner, "should not require statutory authorization for emergency action by the President."⁸⁷ Vermeule defines "epistemic deference":

Epistemic deference is deference to expert judgment about whether a certain *state of facts* exist, while authority-based deference is deference to an agent empowered by some higher source of law to choose a policy or establish a rule, even or especially if there is no fact of the matter or right answer about which policy or rule is best under the circumstances.⁸⁸

Epistemic deference has to do with knowledge of certain facts that the deferring judge allegedly has limited or no access to.⁸⁹ Vermeule has recently argued that Holmes's approach to emergencies was that of "epistemic deference," and that the Holmesian version of "epistemic deference" correlates with the Holmesian view of the emergency as a pure question of fact.⁹⁰ This means that emergencies are objective, factual realities, and that the executive branch knows much more about whether or not they exist.⁹¹

As a final justification for deference, Decisionist scholars have underscored that in the course of U.S. history courts have always deferred to the executive branch in emergencies, and that this is a good thing. For example, during the Civil War, President Lincoln suspended habeas corpus, allowing the Secretary of War to detain 13,000 northern civilians, most of them political opponents of the war.⁹² The arrests were either made without charges or were for vaguely defined offenses created by executive decrees. During World War II, approximately 120,000 individuals of Japanese origin (some of whom were American citizens) were interned in camps on the basis of military orders.⁹³ An exemplary Decisionist summary of the history of emergencies in the U.S. is the following:

⁸⁷ Posner & Vermeule, *supra* note 78, at 316.

⁸⁸ Adrian Vermeule, *Holmes on Emergencies*, 61 STAN. L. REV. 163, 169 (2008) (emphasis added).

⁸⁹ Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1085 (2008).

⁹⁰ Vermeule, *supra* note 88, at 164.

⁹¹ *Id.* In addition, "[o]ther reasons for deference include the President's ability to act more quickly and decisively and with secrecy, and the tendency of the public to rally around the President." Posner & Vermeule, *supra* note 78, at 316.

⁹² For a historical account of Lincoln's suspension of habeas corpus and the consequent ruling by Chief Justice Robert Taney that the executive order was unconstitutional because only Congress can suspend the writ of habeas corpus, see GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 84–88 (2004).

⁹³ See Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755, 781 (2004) ("The Court tends to uphold arguably unconstitutional detentions during national security emergencies, deferring to

[I]t is natural, inevitable, and desirable for power to flow to this branch of government. Congress rationally acquiesces; courts rationally defer. Civil liberties are compromised because civil liberties interfere with effective response to the threat; but civil liberties are never eliminated because they remain important for the well-being of citizens and the effective operation of the government. . . . Both Congress and the judiciary realize that they do not have the expertise or the resources to correct the executive during an emergency. Only when the emergency wanes do these institutions reassert themselves, but this just shows that the basic constitutional structure remains unaffected by the emergency.⁹⁴

In contrast with the view that underscores the grave harms to civil rights during historical emergencies, the Decisionist position is that “the history is largely one of political and constitutional success.”⁹⁵ This is so because “[i]n the United States, unlike in many other countries, the constitutional system has never collapsed during an emergency.”⁹⁶

In sum, based on (1) institutional; (2) epistemic; and (3) historical justifications for deference, the current Decisionist view is that during emergencies “it is important that power be concentrated.”⁹⁷ Power should flow “up from the states to the federal government and, within the federal government, from the legislature and the judiciary to the executive.”⁹⁸ Decisionists have criticized courts when they did not defer to government in national security issues, and praised them when they did.⁹⁹

the Executive’s affirmations of the necessity of detentions.”).

⁹⁴ POSNER & VERMEULE, *supra* note 1, at 4.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 15–16.

⁹⁸ *Id.* at 16.

⁹⁹ See, e.g., Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 205 (2006) (“[U]ntil *Hamdan*, the Supreme Court remained respectful of the President and Congress’s efforts to set wartime policy on the prosecution and punishment of enemy war crimes. . . . The Court used to defer to the working arrangement between the other branches to protect national security and carry out war by deferring to the executive’s interpretation of foreign affairs laws.”); Glenn Sulmasy & John Yoo, *Katz and the War on Terrorism*, 41 U.C. DAVIS L. REV. 1219, 1239 (2008) (Courts have deferred to the executive branch’s “authority to conduct warrantless searches for foreign intelligence purposes” because “the executive can more fully assess the requirements of national security than can the courts, and because the President has a constitutional duty to protect national security, courts should not attempt to constrain his authority to conduct warrantless intelligence searches.”); John Yoo, *An Imperial Judiciary at War: Hamdan v. Rumsfeld*, 2006 CATO SUP. CT. REV. 83, 83, 104 (2006) (The Court’s decision in *Hamdan* “ignores the basic workings of the American separation of powers and will hamper the ability of future presidents to respond to emergencies and war with the

2. *A Question of Sovereignty*

Although current Decisionist approaches have attempted to brush off some of Schmitt's "continental conceptualisms,"¹⁰⁰ we must remember that what was at stake for Schmitt in *Political Theology* and other texts written in the 1920's and 1930's was the issue of sovereignty. Schmitt's primary concern was not how to deal with emergencies. It was how to conceptualize sovereignty.

Schmitt wrote these texts in a time when legal realists in Europe and the United States were increasingly disillusioned by various promises of parliamentary democracy. In particular, two main insights recur in Schmitt's legal realism. First, with the immense population growth in Europe and in the United States and the inevitable growth of the administrative state, it was becoming clear that for the management of large populations, much lawmaking must be done by administrative agencies that were politically appointed rather than elected by the people. Second, these growing populations mostly had no real engagement with politics, and therefore the myth of democratic governance by the people had turned into, at best, the ability to vote. Schmitt and other legal realists (on the left and right) realized that what matters in liberal-democracies, more than sovereignty of the people, is how best to manipulate public opinion.

So at a time when the rule of law was under attack from both right and left, Schmitt sought to return to another theory of sovereignty: one that predated that of the "sovereignty of law." His theory was that the actual sovereign is not the law, but whoever can decide to put the law on hold: the President. Thus, emergencies served as a test-case for his claim that law can never really be sovereign.

Today, too, the stakes for Decisionists might be higher than they seem. Current Decisionist arguments for deference in "legal grey and black holes" are inspired by the Schmittian-Decisionist proposition that "what matters for the reality of legal life is *who* decides."¹⁰¹ This is why the term "Decisionism" best captures the gist of this approach. Sovereignty is, just as it was for Schmitt, a matter of decision, competence, and concrete situations. In emergencies, the most competent institution to make those decisions, according to current Decisionists, is the executive branch. The Decisionist thus breaks from the Legalist in that, for the Decisionist, decisions, and not norms, are what ultimately must secure the nation.

forcefulness and vision of a Lincoln or an FDR. . . . [T]he Founders entrusted the president with the primary responsibility, and therefore the power, to use military force in *situations of emergency*." (emphasis added)).

¹⁰⁰ Vermeule, *supra* note 16, at 1100.

¹⁰¹ SCHMITT, *POLITICAL THEOLOGY*, *supra* note 2, at 34 (emphasis added).

IV. SITES OF LEGALIST AND DECISIONIST DEBATES

Legalism and Decisionism are the two prevalent ways of thinking about emergency powers. Among the multiple contemporary sites of disputes between Legalists and Decisionists, here I focus on three. Section A considers the status of “enemy combatants” in the ongoing “war on terror” as it culminated in the Court’s decision in *Boumediene v. Bush*.¹⁰² Section B examines a debate in legal academia regarding the meaning of the Suspension Clause. And Section C anticipates a future site of Legalist/Decisionist debates: cybersecurity.

Read together, these three examples demonstrate how current emergency-powers debates turn on the two main issues raised in Parts II and III: (1) Can and should the “rule of law” apply at all times; and (2) who should be the main decision-maker in emergencies? Part V will argue that this narrow framing of the debates overlooks a set of political assumptions shared by both approaches.

A. Present: Enemy Combatant Detentions

In the “war on terror” declared shortly after the September 11, 2001 attacks, the legality of the Bush administration’s detention policies was challenged. An important issue in a line of cases leading up to *Boumediene v. Bush* was whether any body of law (international or domestic) was applicable to these detentions.¹⁰³ Although Legalist and Decisionist approaches surfaced throughout this litigation, this Article focuses on their manifestations in *Boumediene*, where non-citizens detained as “enemy combatants” at Guantanamo Bay petitioned for a writ of habeas corpus.

1. The Legalist Boumediene Majority

Justice Kennedy’s opinion in *Boumediene* echoes the two dominant themes of the current Legalist approach to emergency powers. First, “extraordinary times” *do not* necessitate the suspension of ordinary laws. Second, national security matters are governed by the rule of law, and *courts* will ultimately decide how to apply the laws.

First, by dismissing an alternative legal scheme set up by the political branches to determine the status of “enemy combatants,” the *Boumediene* decision placed executive detentions back within the ordinary legal order.

¹⁰² 553 U.S. 723 (2008).

¹⁰³ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

The Court held that petitioners did “have the habeas corpus privilege,”¹⁰⁴ and that the procedures provided by Congress in the Detainee Treatment Act of 2005 (DTA) were “not an adequate and effective substitute for habeas corpus.”¹⁰⁵ Therefore, Section 7 of the Military Commissions Act of 2006 (MCA) “operates as an unconstitutional suspension of the writ.”¹⁰⁶

The Court could have adopted a minimalist approach, addressing only the constitutionality of the specific statutes in question (the MCA and the DTA),¹⁰⁷ but the decision is instead signed with a significantly broader Legalist declaration that “[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.”¹⁰⁸ Furthermore, the Court emphasized that “[t]he political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.”¹⁰⁹

Kennedy’s opinion manifests the Legalist position that national security matters are governed by the rule of law. Accordingly, the government’s argument that Guantanamo is beyond the jurisdiction of U.S. courts was dismissed by the Court because, “by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.”¹¹⁰

Second, whereas all three branches are governed by law, judges (and not the executive branch) have the final word on “what the law is”:

¹⁰⁴ *Boumediene*, 553 U.S. at 732.

¹⁰⁵ *Id.*

¹⁰⁶ 28 U.S.C. § 2241(e) (Supp. 2007); *Boumediene*, 553 U.S. at 732.

¹⁰⁷ See Sunstein, *supra* note 7, at 103.

¹⁰⁸ *Boumediene*, 553 U.S. at 798. This language echoes the dissenting opinion of Justice Murphy in *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (arguing that the exclusion of persons of Japanese ancestry from the Pacific Coast area under the theory of military necessity “goes over the ‘very brink of constitutional power’ and falls into the ugly abyss of racism”). Murphy’s dissent stressed that “[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support,” and that “the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.” *Id.* at 234.

¹⁰⁹ *Boumediene*, 553 U.S. at 798.

¹¹⁰ *Id.* at 765 (“Even when the United States acts outside its borders, its powers are not ‘absolute and unlimited’ but are subject ‘to such restrictions as are expressed in the Constitution.’”).

Abstaining from questions involving formal sovereignty and territorial governance is one thing. *To hold the political branches have the power to switch the Constitution on or off at will is quite another.* . . . The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say “what the law is.”¹¹¹

Kennedy’s opinion dismisses the fundamental principle of the Decisionist position—that the “war on terror” should be governed by executive decision-making. He instead sends a plain warning to the political branches that the Court will not be zoned out of the decision-making process in national security matters. Times have changed: “[b]ecause our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.”¹¹²

In sum, Kennedy’s position in *Boumediene* echoes the two core Legalist principles: (1) the law, not the unbound decisions of the executive branch, will govern in emergencies; and (2) the three branches are individually bound by law, and judges provide the authoritative interpretation of the Constitution.

2. The Decisionist *Boumediene* Dissent

In contrast, the dissenting opinions of Chief Justice Roberts and Justice Scalia in *Boumediene* reflect the Decisionist approach to emergency powers. First, ordinary laws should not apply in extraordinary situations. Second, the executive branch should be the primary decision-maker in emergencies.

First, the underlying premise of the *Boumediene* dissenters is that ordinary laws, and in this case the privilege of habeas corpus, do not apply in extraordinary situations as they would in ordinary situations. Whereas Kennedy’s opinion broadly frames the issue as “whether [the detainees] have the constitutional privilege of habeas corpus, a privilege not to be withdrawn

¹¹¹ *Id.* (emphasis added). A similar position was taken by Justice O’Connor in *Hamdi v. Rumsfeld*, 542 U.S. 507, 535–36 (2004) (“We necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”).

¹¹² *Boumediene*, 553 U.S. at 797–98.

except in conformance with the Suspension Clause, Art. I,”¹¹³ for the dissenters the question is about the habeas privileges of “aliens detained by this country as enemy combatants.”¹¹⁴ This framing of the question is dramatized in Scalia’s opening pronouncement that “for the first time in our Nation’s history, the Court confers a constitutional right to habeas corpus on *alien enemies detained abroad by our military forces in the course of an ongoing war*.”¹¹⁵ Scalia’s Decisionist position (which Roberts joins) is that “[t]he writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court’s intervention in this military matter is entirely *ultra vires*.”¹¹⁶

Chief Justice Roberts adds that “contrary to the repeated suggestions of the majority, DTA review need not parallel the habeas privileges enjoyed by noncombatant American citizens. . . . *It need only provide process adequate for noncitizens detained as alleged combatants*.”¹¹⁷ That is, whereas the majority viewed habeas corpus as a general privilege that applies to all individuals under U.S. sovereignty, the dissenters in fact assert different degrees of habeas corpus privileges, emphasizing that “the critical threshold question in these cases, prior to any inquiry about the writ’s scope, is whether the system the political branches designed protects whatever rights the detainees may possess.”¹¹⁸ According to this Decisionist approach, we are not in the realm of “traditional habeas corpus,” which applies in “normal times” to U.S. citizens and “takes *no* account of what *Hamdi* recognized as the ‘uncommon potential to burden the Executive at a time of ongoing military conflict.’”¹¹⁹ The dissenters underscore the overall inadequacy of Legalism when “America is at war with radical Islamists,”¹²⁰ asserting that “[t]he dangerous mission assigned to our forces abroad is to fight terrorists, not serve subpoenas.”¹²¹ In such times, the Court “most tragically . . . sets our military commanders the impossible task of proving to a civilian court, under

¹¹³ *Id.* at 732.

¹¹⁴ *Id.* at 801 (Roberts, C.J., dissenting).

¹¹⁵ *Id.* at 826–27 (Scalia, J., dissenting) (emphasis added).

¹¹⁶ *Id.* at 827 (Scalia, J., dissenting).

¹¹⁷ *Id.* at 815 (Roberts, C.J., dissenting) (emphasis added).

¹¹⁸ *Boumediene*, 553 U.S. at 802 (Roberts, C.J., dissenting).

¹¹⁹ *Id.* at 812 (Roberts, C.J., dissenting) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004)); see also *id.* at 813 (“The question is whether the CSRT procedures—coupled with the judicial review specified by the DTA—provide the ‘basic process’ *Hamdi* said the Constitution affords American citizens detained as enemy combatants.”).

¹²⁰ *Id.* at 827 (Scalia, J., dissenting).

¹²¹ *Id.* at 816 (Roberts, C.J., dissenting).

whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.”¹²²

Second, the dissenters in *Boumediene* expressed the Decisionist position that courts should defer to the executive branch in matters of national security, primarily due to institutional competence.¹²³ With regard to the majority’s holding that the government “presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims,” Justice Scalia asks, “What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever.”¹²⁴ Thus, “as today’s opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.”¹²⁵ And Scalia warns that “[t]he game of bait-and-switch that today’s opinion plays upon the Nation’s Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed.”¹²⁶

Further, Roberts writes that in reality judges usually defer to the executive branch on issues of national security and therefore the majority’s attempt to enforce its version of legality by granting the habeas corpus privilege is “fruitless.”¹²⁷ The majority opinion “shift[s] responsibility for those sensitive foreign policy and national security decisions from the elected

¹²² *Id.* at 850 (Scalia, J., dissenting).

¹²³ An elaborate version of the Decisionist argument for executive competence is found in Justice Thomas’s dissenting opinion in *Hamdi*: “This detention falls squarely within the Federal Government’s war powers, and we lack the expertise and capacity to second-guess that decision.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 579 (2004) (Thomas, J., dissenting); *id.* at 580–81 (“The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation’s foreign relations. They did so principally because the structural advantages of a unitary Executive are essential in these domains. ‘Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks.’ The principle ‘ingredient’ for ‘energy in the executive’ is ‘unity.’ . . . This is because ‘[d]ecision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number.’ . . . These structural advantages are most important in the national-security and foreign-affairs contexts. ‘Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.’” (citation omitted)).

¹²⁴ *Boumediene*, 553 U.S. at 831 (Scalia, J., dissenting).

¹²⁵ *Id.*

¹²⁶ *Id.* at 827–28 (Scalia, J., dissenting).

¹²⁷ *Id.* at 802 (Roberts, C.J., dissenting).

branches to the Federal Judiciary.”¹²⁸ However, “the habeas process the Court mandates will most likely end up looking a lot like the DTA system it replaces, as the district court judges shaping it will have to reconcile review of the prisoners’ detention with the undoubted need to protect the American people from the terrorist threat”¹²⁹

Finally, in a Decisionist governmental response to *Boumediene*, Attorney General Mukasey asserted that it is not the “most prudent course” to leave to the courts the resolution of the questions that remain after *Boumediene*, and that “[u]nless Congress acts, the lower federal courts will determine the specific procedural rules that will govern the more than 200 cases that are now pending.”¹³⁰ The political branches, and not the judiciary, said Mukasey, “are affirmatively charged by our Constitution with protecting national security, are expert in such matters[,] and are in the best position to weigh the difficult policy choices that are posed by these issues.”¹³¹

Thus, in sharp contrast to the majority’s Legalist position, the dissent’s Decisionist position is that (1) ordinary legal principles may not apply in extraordinary situations; and (2) the executive branch should be the primary decision-maker in the “war on terror.”

B. Past: The Meaning of the Suspension Clause

A key context in which the question of black holes arises is the Suspension Clause,¹³² which has been understood by many as the Constitution’s “express provision for [the] exercise of extraordinary authority because of a crisis.”¹³³ What does a suspension allow the political branches to do in emergencies? Does it temporarily suspend judicial review? Or does it temporarily suspend the law, thus allowing for detentions that would otherwise be unlawful? For example, would a suspension of the writ of habeas corpus after September 11, 2001 have authorized executive detentions of individuals merely “on suspicion that they *might* engage in future acts of terrorism?”¹³⁴ Decisionists and Legalists diverge on this question. The

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Michael B.V. Mukasey, Att’y Gen., Remarks Prepared for Delivery at the American Enterprise Institute for Public Policy Research (July 21, 2008) (transcript available at <http://www.justice.gov/opa/pr/2008/July/08-opa-633.html>).

¹³¹ *Id.*

¹³² U.S. CONST. art. I, § 9, cl. 2 (“The Privilege or the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

¹³³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

¹³⁴ Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 603

Decisionist position is that legal norms are indeed suspended if the Suspension Clause is activated. Legalists disagree, claiming that the Suspension Clause is only a temporary suspension of judicial review.

1. *The Legalist Position*

In *Suspension and the Extrajudicial Constitution*, Trevor Morrison utilizes the two prongs of the Legalist position to explain the meaning of the Suspension Clause.¹³⁵ He argues that (1) the rule of law applies *at all times*; and (2) although all three branches are bound by the rule of law, courts have the ultimate authority to interpret the Constitution.¹³⁶

First, Morrison argues that because the rule of law applies at all times, congressional suspension of habeas corpus does *not* convert an otherwise unlawful detention into a lawful one. Executive actors must conform to legal norms even when the writ of habeas corpus has been suspended. Morrison recognizes that “periods of extreme national crisis may warrant construing certain constitutional norms in a more flexible mode, thus affording the government a broader range of action in the service of the compelling interest in national security.”¹³⁷ However, he writes, “they do not create grounds for simply ignoring those constitutional norms altogether. Constitutional law’s response to emergency is from within the law, not without it.”¹³⁸

Second, Morrison underscores that the rule of law binds executive actors even when judges cannot temporarily enforce it. Judges are not the only implementers of the Constitution, and the unreviewable status of an executive act cannot serve to legitimize it. Thus, “during periods of suspension, executive actors can implement constitutional norms outside the courts. We should require them to do so, or at least recognize that not doing so entails acting unconstitutionally.”¹³⁹ Even when courts cannot enforce the law, all legal actors are guided by their interpretation.¹⁴⁰

2. *The Decisionist Position*

In *Suspension as an Emergency Power*, Amanda Tyler disagrees with Morrison. Tyler offers a Decisionist interpretation of the Suspension Clause.

(2009).

¹³⁵ See Morrison, *supra* note 25, at 1580, 1616.

¹³⁶ *Id.*

¹³⁷ *Id.* at 1615–16.

¹³⁸ *Id.* at 1616.

¹³⁹ *Id.*

¹⁴⁰ See *id.* at 1582.

She argues that (1) civil rights can be *fully* suspended in emergencies; and (2) in such times of suspension, the executive branch is the primary decision-maker, and its decisions are not bound by legal norms.¹⁴¹

This view offers a broad interpretation of the Suspension Clause. It argues that “the Suspension Clause recognizes an extraordinary emergency power, one that does not simply remove a judicial remedy but ‘suspends’ the rights that find meaning and protection in the Great Writ.”¹⁴² Under this view, a detention pursuant to a valid suspension of habeas corpus cannot be legally challenged.¹⁴³ This broad interpretation of the Suspension Clause is based on “the consistent understanding of suspension in this country . . . that comprehends a proper exercise of the power as expanding executive power while ‘suspending’ those rights that find protection and meaning in the Great Writ,” and thus, “although our tradition views imprisonment without due process of law as anathema, in the vein of William Blackstone, it nonetheless recognizes that ‘sometimes, when the state is in real danger, *even this* may be a necessary measure.’”¹⁴⁴ Accordingly, “in a situation of ‘extreme emergency,’ a suspension of the privilege of the writ of habeas corpus calls on the nation to ‘part[] with its liberty for a while, in order to preserve it forever.’”¹⁴⁵

Notably, Tyler’s position *does not follow* the second prong of Decisionism—she does not argue for deference to the executive branch. While Tyler takes the Decisionist view that the rule of law *can* be suspended in emergencies, she warns that “exercises of the power must be closely guarded and carefully checked to ensure that the power is not invoked except in the most dire of national emergencies.”¹⁴⁶ Accordingly, “the executive should not (save possibly in extraordinary and temporary circumstances) be permitted to declare unilaterally that existing circumstances warrant a suspension,”¹⁴⁷ and “Congress, the branch closest to the people, must agree that circumstances warrant taking the dramatic step of suspending the writ.”¹⁴⁸ In addition, “a decision by the political branches to invoke the authority should not be understood as categorically immune from judicial

¹⁴¹ See Tyler, *supra* note 134, at 609.

¹⁴² *Id.* at 603; see also Amanda L. Tyler, *Is Suspension A Political Question?*, 59 STAN. L. REV. 333, 386 (2006).

¹⁴³ David Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 86 (2006).

¹⁴⁴ Tyler, *supra* note 134, at 605.

¹⁴⁵ *Id.* at 605–06 (quoting WILLIAM BLACKSTONE, COMMENTARIES, *136).

¹⁴⁶ *Id.* at 687.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

review.”¹⁴⁹ The Article nonetheless classifies this approach as “Decisionist” because it recognizes the creation of a black hole as the inevitable consequence of a lawful suspension under the Suspension Clause, and because it does not shy away from the possibility of extra-legality in emergencies. As such, this approach incorporates the Schmittian insight that in times of emergency, “the battle must . . . be waged outside the constitution and the law.”¹⁵⁰

C. Future: The New Frontier of Cybersecurity

Legalist and Decisionist debates about emergency powers are likely to continue in the future. One emerging site of Legalist/Decisionist conflict is the regulation of cyberspace. In 2008, then-candidate Obama warned that terrorists “could use our computer networks to deal us a crippling blow.”¹⁵¹ Obama promised to “make cyber security the top priority that it should be in the 21st century.”¹⁵² A current bill called the Cybersecurity Act of 2009 indeed declares that “America’s failure to protect cyberspace is one of the most urgent national security problems facing the country. . . . [O]nly a comprehensive national security strategy . . . will make us more secure.”¹⁵³

1. The Decisionist Proposal

The Decisionist focus on the declaration of emergencies is manifested in a bill introduced by Senators Jay Rockefeller (D-WV) and Olympia Snowe (R-ME) in April of 2009.¹⁵⁴ The draft of the Cybersecurity Act of 2009 authorizes the President to “declare a cybersecurity emergency and order the limitation or shutdown of Internet traffic to and from any compromised Federal Government or United States critical infrastructure information system or network.”¹⁵⁵ The term “critical infrastructure information systems

¹⁴⁹ *Id.* at 606.

¹⁵⁰ SCHMITT, THE CONCEPT OF THE POLITICAL, *supra* note 43, at 47.

¹⁵¹ Barack Obama, Speech at Purdue University (July 16, 2008) (transcript available at http://www.cfr.org/publication/16807/barack_obamas_speech_at_the_university_of_purdue.html (last visited Aug. 19, 2010)).

¹⁵² *Id.*

¹⁵³ Cybersecurity Act, S. 773, 111th Cong. §§ 2(1), 2(1)(c) (2009).

¹⁵⁴ *Id.* Currently, government responsibility for cybersecurity is split: The Pentagon and the National Security Agency safeguard military networks, while the Department of Homeland Security provides assistance to private networks.

¹⁵⁵ Cybersecurity Act § 18(2); *see also* Joby Warrick & Walter Pincus, *Senate Legislation Would Federalize Cybersecurity; Rules for Private Networks Also Proposed*, WASH. POST, Apr. 1, 2009, at A4.

and networks” is broadly defined to include “[s]tate, local, and nongovernmental information systems and networks in the United States designated by the President as critical infrastructure information systems and networks.”¹⁵⁶ This Act, if passed, will authorize the President to shut down all of cyberspace, government and private, upon a decision that an emergency exists. There are no guidelines as to what constitutes an emergency. The legislation also establishes a “Cyber Czar” within the Executive Office of the President and a number of new Department of Commerce-related action items under the purview of the Cyber Czar.¹⁵⁷

A report published by the Congressional Research Service to accompany this proposed initiative voices the justifications of the Decisionist position discussed in Part III regarding executive competence in emergencies.¹⁵⁸ According to the report, “strong justifications support the assertion that the executive branch is best suited to take reasonable and necessary actions to defend the country against cyber-based threats.”¹⁵⁹ The first justification “stems from the broad diversity of cybersecurity threats: the President is arguably best positioned to take a leadership role or create a uniform response to span the range of cyber vulnerabilities.”¹⁶⁰ In addition, “the executive branch is likely most able to integrate intelligence-gathering, military, and other vehicles for addressing the cybersecurity challenge.”¹⁶¹ The report concludes that “multiple policy considerations, including the novel and dispersed nature of cyber threats, might justify an executive-led response to cybersecurity.”¹⁶²

2. *The Legalist Opposition*

The legislation was immediately criticized for shifting too much power to the President. As one critic writes, “The Internet—arguably the most empowering and important innovation of the modern era—is in danger of being stifled by the heavy hand of government control.”¹⁶³ The bill,

¹⁵⁶ Cybersecurity Act § 23 (3)(B).

¹⁵⁷ R. Michael Senkowski & Mimi W. Dawson, *Cybersecurity: A Briefing—Part II*, METRO. CORP. COUNS., Aug. 2009, at 34.

¹⁵⁸ See John Rollins & Anna C. Henning, *Comprehensive National Cybersecurity Initiative: Legal Authorities and Policy Considerations*, CONG. RES. SERV., Mar. 20, 2009, at 8.

¹⁵⁹ *Id.* at 17.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 18.

¹⁶³ Bob Barr, *Cyber Bill Squelches Speech, Curtails Liberty*, ATLANTA J. & CONST., May 20, 2009, at A18.

according to other critics, “risks giving the federal government unprecedented power over the Internet without necessarily improving security in the ways that matter most.”¹⁶⁴ The bill grants “deeply troubling powers over private-sector use of the Internet that should bother every user and purveyor of Internet services.”¹⁶⁵

This concentration of emergency powers in the President, according to some Legalist critics, threatens individual privacy and liberty. Thus, opponents of the bill explain that “[s]ince many of our critical infrastructure systems . . . are in the hands of the private sector, the bill would create a major shift of power away from users and companies to the federal government. This is a potentially dangerous approach that favors the dramatic over the sober response.”¹⁶⁶ The Act has also been characterized as a “dramatic proposal that . . . can actually make matters worse by weakening existing privacy safeguards”¹⁶⁷ and as one in “the recent series of attempts by Uncle Sam to encroach on free speech and freedom of the press.”¹⁶⁸

In sum, judges, legal scholars, legislators, and journalists are all participants in an ongoing debate between Legalism and Decisionism. The status of enemy combatant detentions, the meaning of the Suspension Clause, and the future of cybersecurity have all triggered disputes regarding the rule of law and the balance of powers in emergencies. We have seen that Decisionist approaches have generally argued that extra-legality is necessary and legitimate in situations of extreme emergency, and that the executive branch is the ultimate decision-maker in emergencies. Legalists have disagreed, positing that the “rule of law” can and should apply in emergencies, and that all three branches of government are under a duty to obey the Constitution.

V. THE SHARED POLITICS OF LEGALISM AND DECISIONISM

It may seem that Legalism and Decisionism display vastly different politics in emergencies. They often do not. Decisionists typically argue for fewer civil rights in emergencies,¹⁶⁹ and Legalists argue for more.¹⁷⁰

¹⁶⁴ Jennifer Granick, *Federal Authority Over the Internet? The Cybersecurity Act of 2009*, ELEC. FRONTIER FOUND. (Apr. 10, 2009), <http://www.eff.org/deeplinks/2009/04/cybersecurity-act>.

¹⁶⁵ Barr, *supra* note 163.

¹⁶⁶ Granick, *supra* note 164.

¹⁶⁷ *Id.*

¹⁶⁸ Colleen Carroll Campbell, *Beware Uncle Sam's Interest in New and Old Media*, ST. LOUIS POST-DISPATCH, Sept. 3, 2009, at A17.

¹⁶⁹ See *supra* Part II.

¹⁷⁰ See *supra* Part III; see also DAVID DYZENHAUS, THE CONSTITUTION OF LAW:

Nonetheless, there is a set of three political assumptions shared by many Legalist and Decisionist approaches: (1) emergencies trigger a *necessity* for security measures that are (2) directed against *public enemies* and (3) should be tailored to prevent *future catastrophes*. These assumptions respond to different yet related questions arising in emergencies—questions of what, why, and whom—that is, what the government seeks to prevent (catastrophe); why security measures are needed (necessity); and against whom these measures are targeted (the public enemy). These three prongs also sum up Carl Schmitt's approach to politics.

A. Schmittian Politics

Schmitt claimed that the possibility of politics arises with the figure of the enemy.¹⁷¹ If the enemy were to disappear, the political as such would disappear with it. In particular, the essence of politics is the existence of a public (in contrast with private) enemy.¹⁷² All political actions and motives, writes Schmitt, "can be reduced to the distinction between friend and enemy,"¹⁷³ and "[t]he high points of politics are . . . the moments in which

LEGALITY IN A TIME OF EMERGENCY 60–65 (2006); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1029–30 (2004) ("We urgently require new constitutional concepts to deal with the protection of civil liberties. Otherwise, a downward cycle threatens. . . . Even if the next half-century sees only four or five attacks on the scale of September 11, this destructive cycle will prove devastating to civil liberties by 2050."); Cole, *supra* note 7, at 2594–95 ("There seems to be little reason to trust the political branches to be more attentive to constitutional rights concerns than courts, even if courts themselves do not always perform as we might hope they would."); Martinez, *supra* note 7, at 1015–16 ("All of the U.S. Supreme Court decisions in the terrorism cases thus far have been focused on questions of process, as have a great many of the lower court decisions. . . . [T]here is nothing inherent . . . about terrorism that demands only process-focused responses from courts in democratic societies.").

¹⁷¹ See SCHMITT, THE CONCEPT OF THE POLITICAL, *supra* note 43, at 35.

¹⁷² In contrast with Schmitt's definition of "the political," consider Maurice Blanchot's account of the May 1968 events in Europe:

An innocent presence, a 'common presence' . . . , ignoring its limits, political because of its refusal to exclude anything and its awareness that it was, as such, the immediate-universal, with the impossible as its only challenge, but without determined political wills and therefore at the mercy of any sudden push by the formal institutions against which it refused to react. . . . The impossibility of recognizing an enemy, of taking into account a particular form of adversity, all that was vivifying

MAURICE BLANCHOT, THE UNAVOWABLE COMMUNITY 31 (Pierre Joris trans., 1988).

¹⁷³ SCHMITT, THE CONCEPT OF THE POLITICAL, *supra* note 43, at 26. Schmitt defines the political enemy as "the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible." *Id.* at 27.

the enemy is, in concrete clarity, recognized as the enemy.”¹⁷⁴ The clearest instance of public enmity is when “[t]he friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing.”¹⁷⁵ The identification of the public enemy and the war against him are necessary because without them there would be no politics and no states.¹⁷⁶

The public/private opposition in Schmitt’s definition of the political is significant. Schmitt claims that the enemy has always been considered a *public* enemy, and that the idea of *private* enemy is meaningless. The enemy emerges only in the public sphere.¹⁷⁷ Thus, Schmitt explains the often quoted “Love Thy Enemies” passage (Matthew 5:44; Luke 6:27) as follows: “The enemy in the political sense need not be hated personally, and in the private sphere only does it make sense to love one’s enemy, [that is], one’s adversary.”¹⁷⁸ State-organized violence against public-political enemies is therefore necessary and good. It is politics.

Interestingly, in 1942 George Orwell similarly reflected on the politics of enmity:

As I write, highly civilized human beings are flying overhead, trying to kill me.

They do not feel any enmity against me as an individual, nor I against them. They are “only doing their duty,” as the saying goes. Most of them, I have no doubt, are kind-hearted law-abiding men who would never dream of committing murder in private life. On the other hand, if one of them succeeds in blowing me to pieces with a well-placed bomb, he will never

¹⁷⁴ *Id.* at 67.

¹⁷⁵ *Id.* at 33.

¹⁷⁶ As nicely summed by Oren Gross:

Since political groupings always stand above all other groupings (e.g., religious, economic, cultural, and legal), and since every sphere of human conduct could potentially rise to the level of the political—‘if it is sufficiently strong to group human beings effectively according to friend and enemy’—the exception inevitably permeates all aspects of human existence, and deciding on it becomes the single most important moment in every respect of human activity.

Gross, *supra* note 37, at 1831–32; *see also* SCHMITT, THE CONCEPT OF THE POLITICAL, *supra* note 43, at 53 (“The political entity cannot by its very nature be universal in the sense of embracing all of humanity and the entire world.”).

¹⁷⁷ SCHMITT, THE CONCEPT OF THE POLITICAL, *supra* note 43, at 28 (“Hence the enemy is not the competitor or the adversary in the general sense of the term. Neither is he the personal, private rival whom one hates or feels antipathy for. The enemy can only be an ensemble of grouped individuals, confronting an ensemble of the same nature, engaged in at least a virtual struggle, that is, one that is effectively possible.”).

¹⁷⁸ *Id.* at 29.

sleep any the worse for it. He is serving his country, which has the power to absolve him from evil.¹⁷⁹

Orwell's insight that the "kind-hearted law-abiding" pilots probably feel no individual enmity towards him, but will nonetheless sleep well after killing him, precisely traces Carl Schmitt's understanding of politics and the political enemy.¹⁸⁰ This Schmittian, public-enemy focused notion of politics has indeed been manifested throughout the twentieth century and beyond. Jews, Communists, people of Japanese origin, and those killed by Stalin, Mao, and Pol Pot are a few examples of groups who were understood as public enemies of different nations in the twentieth century whose exclusion or destruction was considered necessary for survival.¹⁸¹ By grouping these examples together I do not mean to ignore that state-organized violence against public enemies takes different forms in different contexts. Genocides and war-time detentions are different in harm, ideology, and techniques. Nonetheless, the Schmittian idea that at the core of politics stands a struggle with the political-public enemy, I think, underlies much state-inflicted violence in the twentieth century. Today, the political-public enemy of many western nations, including the United States, is the Islamic terrorist.

B. *Necessity*

Decisionists and Legalists share the political assumption that security measures are sometime necessary for the preservation of the state, and that in such cases civil liberties decline. Emergencies, according to both Decisionists and Legalists, may give rise to such conditions of necessity. As argued in Parts II to IV, the critical difference between Legalists and Decisionists is that Decisionists argue that security measures necessitate extra-legal executive action, whereas Legalists argue that security measures must operate within the rule of law.

1. *Decisionism*

The Decisionist position is that the decline in civil liberties in times of national security emergencies is the inevitable consequence of a calculated shift in the balance between security and liberty. Security trumps liberty in

¹⁷⁹ George Orwell, *The Lion and the Unicorn: Socialism and the English Genius*, in *WHY I WRITE* 11, 11 (2004).

¹⁸⁰ See also HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 195–205 (1989) (Eichmann distinguishes specific Jewish people that he liked and respected from his willingness to obey the laws of his nation that view the Jew as a public enemy).

¹⁸¹ See, e.g., *Korematsu v. United States*, 323 U.S. 214, 219–20 (1944).

emergencies. Thus, Decisionists have claimed that constitutional protections during emergencies should be “relaxed,” and that “executive . . . misuse of the power for political gain” is “justified by the national security benefits.”¹⁸² The main argument is that the “point of balance” between national security and civil liberties shifts towards security in times of emergency.

In *Not a Suicide Pact*, Richard Posner quotes Justice Jackson’s famous words that “[t]he choice is not between order and liberty. It is between liberty with order and anarchy without either.”¹⁸³ Posner argues that “the weight of concerns for public safety increases relative to that of liberty concerns, and civil liberties are narrowed.”¹⁸⁴ In contrast, “[i]n safer times, the balance shifts the other way and civil liberties are broadened.”¹⁸⁵ This, according to Posner, is the inevitable result of lawmakers’ aspiration for a certain point in a formula, “at which a slight expansion in the scope of the right would subtract more from public safety than it would add to personal liberty and a slight contraction would subtract more from personal liberty than it would add to public safety.”¹⁸⁶

Similarly, John Yoo has argued that the cost of protecting civil liberties in emergencies is a decline in security, and “[e]xcessive worry about civil liberties prevents us from thinking more aggressively about electronic surveillance.”¹⁸⁷ Yoo further argues that for two additional reasons civil liberties should decline in times of emergency. First, “[l]egitimate political activities and speech by American citizens are not being suppressed.”¹⁸⁸ Second, there is nothing new about these incursions on human rights, for “civil liberties throughout our history have expanded in peacetime and contracted during emergencies. During the Civil War, the two world wars, and the Cold War, Congress and the President restricted civil liberties, and courts deferred; during peacetime, civil liberties expanded.”¹⁸⁹

Courts tend to accept and reiterate such arguments from necessity.¹⁹⁰ As Eugene Kontorovich has argued, “[t]he Court tends to uphold arguably unconstitutional detentions during national security emergencies, deferring to

¹⁸² POSNER & VERMEULE, *supra* note 1, at 16.

¹⁸³ *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (“There is a danger that if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional bill of rights into a suicide pact.”).

¹⁸⁴ POSNER, *supra* note 83, at 9.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 31.

¹⁸⁷ JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 96 (2006).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ POSNER, *supra* note 83, at 32; Vermeule, *supra* note 16, at 1143.

the Executive's affirmations of the necessity of the detentions."¹⁹¹ Christopher Kutz has also argued with regard to the "torture memo"¹⁹² that "[t]he override of detainee rights against torture has been justified on grounds of 'necessity,' i.e., that the welfare cost of observing the right would be too great for the nation rationally to bear."¹⁹³

2. Legalism

The Obama Administration has so far reasoned from necessity in a manner hardly distinguishable from that of the former Bush Administration. Although the commitment to legality and the rule of law is frequently underscored by the President and government officials, the Administration has pursued a similar politics of necessity, as evident in the following two examples.

a. *The Prison at Guantanamo Bay*

The closing of the military prison at Guantanamo was announced within the first few months of the new Administration.¹⁹⁴ As discussed in Part IV, the Bush Administration's practice of detaining "enemy combatants" at Guantanamo raised serious issues of legality. Legalist commentators, as well as the *Boumediene* majority, criticized the Administration for intentionally setting up a legal "black hole" outside the scope of U.S. law and its protections.¹⁹⁵ It came as no surprise then that the new Administration would

¹⁹¹ Kontorovich, *supra* note 93, at 781–82 ("During the Civil War, President Lincoln suspended habeas corpus, allowing the Secretary of War to detain 13,000 Northern civilians, most of them political opponents of the war. The arrests were either made without charges or were for vaguely defined offenses created by executive decrees. During World War II, approximately 120,000 Japanese were interned in camps on the basis of military orders.").

¹⁹² Memorandum from Office of Legal Counsel on Standards of Conduct for Interrogation to Alberto R. Gonzales, Att'y Gen. (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> (widely known as the "torture memo").

¹⁹³ Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CAL. L. REV. 235, 236 (2007). Kutz concludes that "[b]y removing politics from the formal legal restraints that legitimate it, the theory of extralegal authority transforms necessity into a device for overriding all rights in the name of the security of a nation whose political identity has perforce been lost." *Id.* at 266.

¹⁹⁴ Mark Mazzetti & William Glaberson, *Obama Issues Directive to Shut Down Guantánamo*, N.Y. TIMES, Jan. 22, 2009, at A1.

¹⁹⁵ See *supra* Part IV.

prioritize the eradication of this notorious, internationally condemned “black hole.”

The dramatic announcement to the press about the closing of the base was followed by a noteworthy justification. Though one may have expected explicit language of human dignity, liberty, or fairness, the main reason to close Guantanamo was, according to a senior official in the Obama administration, “protecting our national security, respecting the Geneva Conventions and the rule of law, and respecting the existing institutions of justice in this country.”¹⁹⁶ That is, the base was closed primarily to protect the American people and the rule of law. It is important to see here that at least in the universe of this statement, the vulnerable party is not the prisoner at Guantanamo but the American people and the rule of law.

A few months later, the Administration revealed a plan to create a special facility inside the United States where Guantanamo inmates would be detained, tried, and imprisoned.¹⁹⁷ The proposal involved a facility that would include a detention center for terror suspects, courtrooms for criminal trials, and military commissions. President Obama explained that he would move to “construct a legitimate legal framework to justify the ongoing detention of dangerous terrorism suspects who could not be tried or released.”¹⁹⁸ Obama added that “military commissions, which allow defendants fewer rights, would be the ‘appropriate venue’ for the trials of at least some detainees,”¹⁹⁹ and that Guantanamo detainees who are understood to be posing a national security threat but cannot be prosecuted, either for lack of evidence or because evidence is tainted, should indeed be subject to “prolonged detention” with oversight by the courts and Congress.²⁰⁰ However, Republican pressure in Congress led to the approval of a non-binding recommendation banning the transfer of the detainees inside the United States.²⁰¹ Later in 2009, the House voted to allow detainees being

¹⁹⁶ Nomination Hearing for Director of Intelligence before the S. Select Comm. on Intelligence, 111th Cong. 7 (2009) (statement of Dennis C. Blair, nominee, Director of National Intelligence), available at <http://intelligence.senate.gov/090122/blair.pdf>.

¹⁹⁷ Bobby Ghosh, *New Gitmo Proposal Draws Wide Range of Critics*, TIME (Aug. 4, 2009), <http://www.time.com/time/nation/article/0,8599,1914444,00.html>.

¹⁹⁸ Sheryl Gay Stolberg, *Obama Would Move Some Detainees to U.S.*, N.Y. TIMES, May 22, 2009, at A1.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Charlie Savage, *U.S. Said to Pick Illinois Prison to House Detainees*, N.Y. TIMES, Dec. 15, 2009, at A26. Republicans have also proposed legislation to defend the Midwest from this pending threat. See Keep Terrorists Out of the Midwest Act, H.R. 4120, 111th Cong. (1st Sess. 2010); see also Keep Terrorists Out of America Act, H.R. 2294, 111th Cong. (1st Sess. 2010).

held at Guantanamo to be transferred to the United States, but only to stand trial.²⁰²

As of today, the Guantanamo prison facility is still open. In January 2010, an Administration official announced that the Administration has decided to continue to imprison, without trials, nearly fifty detainees at Guantanamo “because a high-level task force has concluded that they are too difficult to prosecute but too dangerous to release.”²⁰³ In sum, the new Administration has not pulled away from its predecessor’s politics of necessity, the attendant practices of indefinite detentions, and trials by military commissions with substantially fewer rights. The main difference is that now the detainees are under the oversight of courts and Congress, and within the “rule of law.”

b. *Release of Prisoner Abuse Photographs*

Another example of the Legalist politics of necessity implemented by the Obama Administration involves its refusal to release photographs of prisoner abuse by U.S. troops. The government appealed a 2008 decision by the U.S. Court of Appeals for the Second Circuit, which ruled that the government must release the photos to comply with an American Civil Liberties Union (ACLU) Freedom of Information Act (FOIA) lawsuit.²⁰⁴ In May of 2009, government lawyers objected to a court-ordered release of images revealing alleged abuse of detainees “because the release could affect the safety of U.S. troops.”²⁰⁵ President Obama explained that “the most direct consequence of releasing them would be to further inflame anti-American opinion, and to put our troops in greater danger.”²⁰⁶ Defense Secretary Gates added that “our commanders . . . have expressed very serious reservations about this . . . [suggesting] that the release of these photographs will cost American lives.”²⁰⁷ After the Obama administration filed its appeal with the Supreme Court, Congress passed the Protected National Security Documents Act of

²⁰² David Stout, *House Backs Detainee Transfers*, N.Y. TIMES, Oct. 16, 2009, at A17.

²⁰³ Charlie Savage, *Detainees Will Still Be Held, But Not Tried, Official Says*, N.Y. TIMES, Jan. 22, 2010, at A14 (“[T]he administration has decided that nearly 40 other detainees should be prosecuted for terrorism or related war crimes. And the remaining prisoners, about 110 men, should be repatriated or transferred to other countries for possible release . . .”).

²⁰⁴ *ACLU v. Dep’t of Defense*, 543 F.3d 59 (2d Cir. 2008), *vacated and remanded* by 130 S. Ct. 777 (2009).

²⁰⁵ Ed Hornick, *Obama Reverses Course on Alleged Prison Abuse Photos*, CNN (May 13, 2009), <http://www.cnn.com/2009/POLITICS/05/12/prisoner.photos/index.html>.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

2009.²⁰⁸ The Act permits the administration to exempt from the FOIA photographs “taken during the period beginning on September 11, 2001, through January 22, 2009, . . . if the Secretary of Defense determines that disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.”²⁰⁹ On November 30, 2009, in light of the intervening Act, the Supreme Court vacated and remanded the Second Circuit’s decision ordering the release of the photos.²¹⁰

The logic here is similar to the proposal to relocate Guantanamo inside the United States. The President does not claim here that transparency and public scrutiny of government are not important democratic practices and values. The President agrees that they are. This was in fact part of his agenda both during the presidential campaign and since the election.²¹¹ The point is that transparency is desirable unless it may “inflame anti-American opinion” and “put our troops in greater danger.”²¹² Necessity trumps the democratic values that would otherwise demand the publication of these abuse photos.²¹³ Moreover, the trajectory of the case reflects the Legalist preference for folding the exception into the law through recourse to congressional action to legalize the President’s security-driven decision-making.

C. *Enmity*

As discussed above, Schmitt claimed that politics must involve war against a public enemy. The classification that currently captures this Schmittian insight is that of the “enemy combatant.” Enemy combatants are not considered Prisoners of War (POWs) and are therefore not entitled to the general legal protections of the laws of war. The difference between “enemy combatants” and “lawful combatants” is that whereas both are subject to capture and detention as POWs by opposing forces, “enemy combatants” are also “subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”²¹⁴ The “enemy combatant” status places

²⁰⁸ Protected National Security Documents Act of 2009, Pub. L. No. 111-83, § 565.

²⁰⁹ *Id.*

²¹⁰ *Dep’t of Def. v. ACLU*, 130 S. Ct. 777, 777 (2009).

²¹¹ *Id.*

²¹² *Id.*

²¹³ 319 Freedom of Information Act lawsuits were filed during Barack Obama’s first year as president, as opposed to 298 and 278 per year in the last two years of the Bush Administration. Carol D. Leonnig, *Over 300 Public-Records Lawsuits Filed in Obama’s First Year*, WASH. POST, Jan. 27, 2010, at A3.

²¹⁴ *Ex Parte Quirin*, 317 U.S. 1, 31 (1942).

non-citizens suspected of Islamic terrorism out of the reach of ordinary laws, and in the hands of military tribunals.²¹⁵

1. *Decisionism*

The term “enemy combatant” and its usage significantly changed and broadened in the war on terror that followed the events of September 11, 2001. In 1942, the Court in *Ex Parte Quirin* defined “enemy combatant” as follows:

The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.²¹⁶

The *Quirin* definition of “enemy combatant” reflects an assumption that good war takes place between recognizable armies of legitimate nation-states. What one wears and how one presents oneself are key parts of how the *Quirin* Court understands the “enemy combatant” status in 1942. By acting without a uniform, one is disguising oneself as a friend when one is in fact an enemy. The main idea then was that those who can be mistaken for friends but are in fact enemies are deemed “offenders against the law of war,” and can consequently be tried and punished by military tribunals for these acts of

²¹⁵ See Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1827 (2009) (“[F]rom the traditional perspective of Anglo-American law, . . . a preliminary inquiry about who is within the protection of the law is essential—not to justify lawless government action, but precisely to hold off claims of lawless power and to preserve legal rights.”).

²¹⁶ *Ex Parte Quirin*, 317 U.S. at 31 (“[T]he law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or *property*, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.” (emphasis added) (citations omitted)).

transgression. So, for the *Quirin* Court in 1942, the term “enemy combatant” marked a transgressive act of war (bad violence), as opposed to a “normal” act of war (good violence).

In contrast, in the current war on terror there is no designated “normal” act of war for the public enemy. There is no legitimate Taliban or al Qaeda army that can operate within ordinary laws of war. All acts of war performed by such organizations are outside the laws of war.²¹⁷ And all members of such organizations are classified as “enemy combatants.”²¹⁸ On November 13, 2001, then-President Bush issued an order entitled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.”²¹⁹ An “enemy combatant” was consequently defined by the Bush Administration as follows:

[A]n individual who was part of or supporting the Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.²²⁰

As some commentators have noted, this definition is significantly broader than the one set forth by the Court in *Quirin*. Now any supporter of an organization designated as “terrorist” is within the scope of the definition regardless of whether the person actually committed any acts of war.²²¹ More importantly, the new definition is different in that the enemy is marked by identification with a specific cause or politics (Islamic, anti-Western), rather than by transgressing a general set of norms of war.

In sum, during the Bush era the reframing of the special category of “enemy combatant” enabled a regime of indefinite detentions and interrogations without trial of the public enemy in the war on terror.

²¹⁷ *Id.*

²¹⁸ In this context it is interesting that the war is called “war on terror,” terror being more of an abstract act than a clear enemy to which one can point.

²¹⁹ *Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

²²⁰ Memorandum from the Deputy Sec’y of Def. on Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatant Detained at U.S. Naval Base, Guantanamo Bay, Cuba to Sec’y of the Military Dep’ts (July 14, 2006), at 1, available at <http://www.defense.gov/news/Aug2006/d20060809CSRTProcedures.pdf>.

²²¹ *Id.* at 3.

2. Legalism

*"As we work towards developing a new policy to govern detainees, it is essential that we operate in a manner that strengthens our national security, is consistent with our values, and is governed by law."*²²²

- U.S. Attorney General Eric Holder 2009

In January 2009, the Bush Administration was replaced by the Obama Administration. In March 2009, the Department of Justice indicated that the United States would no longer use the term "enemy combatants" to characterize detained al Qaeda or Taliban members or supporters. The government nonetheless maintained that it had the right to detain persons who provided substantial support for al Qaeda and the Taliban without criminal charges, based on the Congressional Authorization for the Use of Military Force (AUMF),²²³ as informed by the laws of war.²²⁴ The government explained that its new standard "relies on the international laws of war to inform the scope of the president's authority under this statute [the AUMF], and makes clear that the government does not claim authority to hold persons based on insignificant or insubstantial support of al Qaeda or the Taliban."²²⁵

The government dropped the previous Administration's position that the power to detain independently flowed from the President's constitutional powers as commander-in-chief.²²⁶ Instead, it linked its new policy to legal principles governed by the rule of law:

The laws of war have evolved primarily in the context of international armed conflicts between the armed forces of nation states. This body of law, however, is less well-codified with respect to our current, novel type of

²²² Del Quentin Wilber & Peter Finn, *U.S. Retires 'Enemy Combatant,' Keeps Broad Right to Detain*, WASH. POST, Mar. 13, 2009, at A6.

²²³ Congressional Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

²²⁴ Press Release, U.S. Dep't of Justice, Department of Justice Withdraws "Enemy Combatant" Definition for Guantanamo Detainees, No. 09-232 (Mar. 13, 2009), <http://www.usdoj.gov/opa/pr/2009/March/09-ag-232.html> ("The definition does not rely on the President's authority as Commander-in-Chief independent of Congress's specific authorization. It draws on the international laws of war to inform the statutory authority conferred by Congress. It provides that individuals who supported al Qaeda or the Taliban are detainable only if the support was substantial. *And it does not employ the phrase 'enemy combatant.'*" (emphasis added)).

²²⁵ *Id.*

²²⁶ John R. Crook, *United States Abandons Detention Based on Designation as Enemy Combatant But Maintains Right to Detain Persons Giving Substantial Support to Terrorism*, 103 AM. J. INT'L L. 351, 351-52 (2009).

armed conflict against armed groups such as al-Qaida and the Taliban. Principles derived from law-of-war rules governing international armed conflicts, therefore, must inform the interpretation of the detention authority Congress has authorized for the current armed conflict.²²⁷

Laws of war, according to the above, are not well equipped to deal with this “novel type” of conflict. Nonetheless, these principles “must inform” the interpretation of AUMF. And so goes the government’s interpretation of AUMF:

Accordingly, under the AUMF, the President has authority to detain persons who he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for the September 11 attacks. The President also has the authority under the AUMF to detain in this armed conflict those persons whose relationship to al-Qaida or the Taliban would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable. . . . The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.²²⁸

Whereas the former Administration viewed the President’s powers as part of the war powers as commander-in-chief, the current Administration locates these powers in congressional authorization. By dropping the “enemy combatant” classification, alluding to statutory authority, and invoking vague and mostly inapplicable principles of international law, the current Administration has managed to accomplish the primary goal of current Legalism: to fold the exception back into the realm of law. But it has not altered the previous Administration’s politics of enmity. Thus, for those

²²⁷ Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (TFH) (D.C. Cir. Mar. 13, 2009), <http://www.usdoj.gov/opa/documents/memo-re-det-auth.pdf>.

²²⁸ *Id.* at 1–2 (“It is neither possible nor advisable, however, to attempt to identify, in the abstract, the precise nature and degree of ‘substantial support,’ or the precise characteristics of ‘associated forces,’ that are or would be sufficient to bring persons and organizations within the foregoing framework. . . . [T]he particular facts and circumstances justifying detention will vary from case to case, and may require the identification and analysis of various analogues from traditional international armed conflicts. Accordingly, the contours of the ‘substantial support’ and ‘associated forces’ bases of detention will need to be further developed in their application to concrete facts in individual cases.”).

towards whom state violence is directed, nothing much seems to have changed.²²⁹

D. *Catastrophe*

The third shared characteristic of Decisionist and Legalist politics is their perception of time and history. The task of the state and its laws, according to current U.S. Decisionism and Legalism, is to prevent future catastrophes. Catastrophe, in this view, is conceptualized as an event that takes place not in the present but in the future. The catastrophe is rarely viewed as a current harm inflicted by the state, the government, the army, or the law. The catastrophe is instead what society seeks to prevent from occurring in the future.

1. *Decisionism*

The basic Decisionist assumption is that catastrophes are very likely to occur in the future if security measures pursued by the executive branch are restricted by Congress or courts. Scalia's dissenting opinion in *Boumediene* provides a vivid example of this perception of catastrophe:

America is at war with radical Islamists. . . . On September 11, 2001, the enemy brought the battle to American soil, killing 2,749 at the Twin Towers in New York City, 184 at the Pentagon in Washington, D. C., and 40 in Pennsylvania. It has threatened further attacks against our homeland; one need only walk about buttressed and barricaded Washington, or board a plane anywhere in the country, to know that the threat is a serious one. . . . The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed.²³⁰

In Scalia's account here, the events of September 11 are only part of a chain of events that makes up America's "war with radical Islamists." The catastrophe is pending in the future, in which "almost certainly" more Americans will be killed. Thus, as the concluding lines of Scalia's dissent warn, "[t]he Nation will live to regret what the Court has done today."²³¹

A similar notion of catastrophe also underlies Vermeule and Posner's Decisionist proposition that emergencies "lie on a continuum" at the extreme end of which are "policies adopted in times of full-blown crisis, when it might be reasonable to believe that serious harms threaten the nation, as in

²²⁹ See also Martinez, *supra* note 7, at 1015.

²³⁰ *Boumediene v. Bush*, 553 U.S. 723, 827–28 (2008) (Scalia, J., dissenting).

²³¹ *Id.* at 850.

the immediate aftermaths of Pearl Harbor or 9/11.”²³² In such instances, “[t]ime is of the essence, the stakes of blocking necessary government action are possibly catastrophic, and uncertainty reigns.”²³³ Thus, although “[w]ith the benefit of hindsight, the early [governmental] reactions [to an emergency] might seem inexplicable except as a result of panic . . . this does not do justice to the problem that the government faces at the time of emergency, when uncertainty is great and the consequence of error may be catastrophic.”²³⁴ Interestingly, in this Decisionist articulation, even “times of full-blown crisis” such as September 11 and Pearl Harbor are *not* themselves deemed catastrophic. They are only alarming signs of greater pending catastrophes.

Fear as a legitimate motivation for government action is one consequence of this Decisionist notion of catastrophe. In response to the “view that panicked government officials overreact to an emergency and unnecessarily curtail civil liberties,” Posner and Vermeule offer what they call a “more constructive theory of the role of fear.”²³⁵ They argue that:

Before the emergency, government officials are complacent. They do not think clearly or vigorously about the potential threats faced by the nation. After the terrorist attack or military intervention, their complacency is replaced by fear. Fear stimulates them to action. Action may be based on good decisions or bad: *fear might cause officials to exaggerate future threats, but it also might arouse them to threats that they would otherwise not perceive*. It is impossible to say in the abstract whether decisions and actions provoked by fear are likely to be better than decisions and actions made in a state of calm. But our limited point is that there is no reason to think that the fear-inspired decisions are likely to be worse.²³⁶

Fear, according to Posner and Vermeule, is not necessarily a bad trigger for action. It arouses officials to the future possibility of catastrophe. Thus, while the writers concede that fear might have the negative impact of exaggerating future threats, it may also lead officials to save the nation from catastrophes they may not have foreseen if it was not for the fear.

The point here is not that the Decisionists are wrong in their predictions about the future (that we cannot know), but that the Decisionists operate under a political assumption that is haunted by an idea of catastrophe that is yet to come.²³⁷ We cannot know whether an event such as 9/11 is indeed a

²³² POSNER & VERMEULE, *supra* note 1, at 42.

²³³ *Id.*

²³⁴ *Id.* at 86.

²³⁵ *Id.* at 64.

²³⁶ *Id.* (emphasis added).

²³⁷ See WALTER BENJAMIN, THE ORIGIN OF GERMAN TRAGIC DRAMA 65–66 (John

sign of future catastrophes, the culmination of past catastrophes, or just a present isolated catastrophe. And yet it is only within a particular perspective of history that the future is haunted by catastrophe waiting to occur. As it happens, this view is currently shared by Legalism and Decisionism.

2. Legalism

Legalist positions frequently share the Decisionist anticipation of future catastrophes. But whereas Decisionists have utilized this notion of catastrophe to argue for greater executive power, Legalists have often concentrated their efforts on bringing governmental responses to future catastrophes within the rule of law. As Justice Kennedy wrote in *Boumediene*:

The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate. The ways to disrupt our life and laws are so many and unforeseen that the Court should not attempt even some general catalogue of crises that might occur. Certain principles are apparent, however. Practical considerations and exigent circumstances inform the definition and reach of the law's writs, including habeas corpus. The cases and our tradition reflect this precept.²³⁸

In other words, while the future will likely bring a range of many real and as yet unforeseen catastrophes, the proper response to this reality is through law. Another example of this Legalist faith in law's governance of future catastrophes is found in Bruce Ackerman's *Emergency Constitution*. Ackerman predicts:

Terrorist attacks will be a recurring part of our future. The balance of technology has shifted, making it possible for a small band of zealots to wreak devastation where we least expect it—not on a plane next time, but with poison gas in the subway or a biotoxin in the water supply. The attack of September 11 is the prototype for many events that will litter the twenty-first century. We should be looking at it in a diagnostic spirit: What can we learn that will permit us to respond more intelligently the next time around?²³⁹

Osbourne trans., 1998) ("The ruler is designated from the outset as the holder of dictatorial power if war, revolt, or other catastrophes should lead to a state of emergency. This is typical of the Counter-Reformation . . . [f]or as an antithesis to the historical ideal of restoration it is haunted by the idea of catastrophe. And it is in response to this antithesis that the theory of the state of emergency is devised.").

²³⁸ *Boumediene v. Bush*, 553 U.S. 723, 793 (2008).

²³⁹ Ackerman, *supra* note 170, at 1029.

This depiction of a twenty-first century littered with zealot attacks on our subway and water portrays the attacks of 9/11 not as a stand-alone event, but as a “prototype” of the much greater catastrophes that will follow. The problem, according to Ackerman, is that when terrorism strikes, “a downward cycle threatens: [a]fter each successful attack, politicians will come up with repressive laws and promise greater security—only to find that a different terrorist band manages to strike a few years later.”²⁴⁰ In other words, this is a kind of anti-terrorism whack-a-mole. Thus:

To avoid a repeated cycle of repression, defenders of freedom must consider a more hard-headed doctrine—one that allows short-term emergency measures but draws the line against permanent restrictions. . . . [T]he self-conscious design of an emergency regime may well be the best available defense against a panic-driven cycle of permanent destruction.²⁴¹

Ackerman’s thoughtful attempt to reconcile the rule of law with the need for temporary emergency measures captures the prevalent mode of many current versions of Legalism. We are undoubtedly expecting catastrophe, but we must respond to it through the rule of law.²⁴²

To conclude, current forms of U.S. Decisionism and Legalism often share the three basic tenets of Carl Schmitt’s political doctrine: (1) emergencies create the necessity for security measures (2) that are directed against public enemies (3) in order to prevent greater catastrophes in the future.

VI. TOWARDS A HUMANIST DECISIONISM

The first step in articulating an alternative to Legalism and Decisionism is the recognition that politics and jurisprudence are sometimes

²⁴⁰ *Id.* (citation omitted).

²⁴¹ *Id.* at 1030.

²⁴² Ackerman proposes that only an actual terrorist attack should trigger “the emergency constitution.” Unlike a “clear and present danger” standard, which can be manipulated by the President and the executive branch, a “major terrorist attack is an indisputable reality, beyond the capacity of politicians to manipulate,” and “that’s why it serves as the best trigger for an emergency regime.” *Id.* at 1060. Ackerman suggests that a legal formula should be devised to restrict this triggering event. His suggested formula states, “State of emergency may be proclaimed by the Executive in response to a terrorist attack that kills large numbers of innocent civilians in a way that threatens the recurrence of more large-scale attacks. The declaration lapses within seven days unless approved by a majority of the legislature.” *Id.* For various criticisms of Ackerman’s proposal, see, e.g., POSNER & VERMEULE, *supra* note 1, at 162–68; Dyzenhaus, *supra* note 7, at 2015–17; Laurence Tribe, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1829 (2004).

distinguishable. In our case, the disaggregation of politics and jurisprudence uncovers some basic flaws in Legalism and Decisionism.

The main flaw of current Decisionism is revealed once jurisprudence is set aside from politics; this is because Decisionists have quite wisely combined the two into a causal argument in the form of “*if Jurisprudence then Politics*.” The Decisionist “*if . . . then . . .*” claim simply means that if law cannot predict all possible situations that arise in emergencies, then civil liberties must decline in emergencies, public enemies must be fought, and catastrophes are pending. This argument, which legitimizes state violence in times of emergency, is substantially weakened if one sees that the question of the law “running out” and the questions of necessity, enmity, and catastrophe are separate. Lawlessness need not coincide with anti-humanist politics. Decisionist jurisprudence need not be linked to a politics of necessity, enmity, and catastrophe.

The Decisionist accepts that sometimes norms will contradict one another, and sometimes the law will “run out.”²⁴³ But decision-making based on intuition does not have to locate enmity at the core of politics. The decision-maker might prefer a politics of hospitality and friendship. For example, Austin Sarat and Nasser Hussain have argued that clemency should be understood as “legally sanctioned illegality,” which in fact bears structural similarity to executive emergency powers.²⁴⁴ The decision to pardon a convicted criminal, though legally sanctioned (in the sense of legally approved), is a type of decision that is not governed by a set of legal norms, and is thus a legally sanctioned form of illegality. This is a type of Decisionism that is driven by forgiveness rather than by fear or enmity.

On the Legalist end, the disaggregation of jurisprudence from politics underscores that many current forms of Legalism in the United States have prioritized jurisprudence over politics. Legalist politics, as we have seen, are

²⁴³ Kennedy, *supra* note 2, at 1163 (“What makes the thinker a decisionist is not that he has a global or ontological critique of justificatory closure, but that, after coming upon a situation of choice where governing norms contradict one another or ‘run out,’ he refuses the enterprise of either repairing the discourse or replacing it with a new discourse that will be more determinate. *If the decisionist is a responsible actor*, and time has run out at the same time ‘the law’ has, then she accepts that she will just have to ‘do it’ on the basis of intuition rather than with a ‘warrant.’” (emphasis added)).

²⁴⁴ Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307, 1314 (2004) (“[A] jurisprudence of emergency draws attention to a more fundamental question that subtends such periodic crises: How does a system of rules understand and accommodate the exercise of a power that is by its very nature unbound by rules? This is also the question that animates our analysis of the power to pardon. Executive clemency, of course, does not generally deal in terms of imminent peril or collapse; its usual idiom is one of mercy and not danger. And yet, for us, the two situations are not entirely dissimilar, as they both highlight the complex relations of rules and exceptions.”).

often aligned with Decisionist politics. Many Legalist approaches have acceded to the Decisionist politics of necessity, enmity, and catastrophe, the main difference being that Legalists have attempted to engage in these politics from *within* the rule of law rather than through a language of exceptionalism.

From a freedom-enhancing perspective, there is much to gain by setting aside the jurisprudential questions of the law and the exception. David Dyzenhaus has written that “[t]o answer [the Decisionist] challenge one needs to show that there is a substantive conception of the rule of law that is appropriate at all times.”²⁴⁵ I disagree. The Schmittian challenge should not be reduced to its narrow jurisprudential claims about exceptionalism. It should not be reduced to whether or not courts and legislatures can properly review or enact emergency measures. Schmitt’s difficult and very timely challenge is the linking of jurisprudential claims about emergencies to the political claims about necessity, enmity, and catastrophe. This link must be undone.

A. Defining Humanist Decisionism

One of the aims of this Article is to unlink Decisionist jurisprudence from some of its current political claims by offering another type of Decisionism: Humanist Decisionism. This approach accepts some key Decisionist insights about jurisprudence but is at the same time Humanist in politics.

1. A Politics of Hospitality and Friendship

The currently prevailing Schmittian assumption that politics *must* stem from enmity, necessity, and catastrophe has been heavily criticized by a number of twentieth century thinkers who have instead conceptualized politics in terms of hospitality and friendship.²⁴⁶

A politics of hospitality and friendship contests the idea that “[w]ar is a mere continuation of politics by other means.”²⁴⁷ At the end of the eighteenth

²⁴⁵ Dyzenhaus, *supra* note 7, at 2037.

²⁴⁶ See generally HANNAH ARENDT, THE PROMISE OF POLITICS (2009); WALTER BENJAMIN, THE ORIGIN OF GERMAN TRAGIC DRAMA (2003); JACQUES DERRIDA, ADIEU: TO EMMANUEL LEVINAS (1999) [hereinafter DERRIDA, ADIEU]; JACQUES DERRIDA, POLITICS OF FRIENDSHIP (1994); MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION (2007); Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, in NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER (1995); Giorgio Agamben, *States of Emergency*, <http://www.generation-online.org/p/fpagambenschmitt.htm>.

²⁴⁷ 1 CARL VON CLAUSEWITZ, ON WAR 23 (J.J. Graham trans., 1911).

century, in an essay called *Perpetual Peace*, Immanuel Kant disputed the then- and now-held perception that armies are necessary for the peaceful existence of humanity.²⁴⁸ Kant instead called for conditions of “universal hospitality.”²⁴⁹ To adapt Kant’s point, hospitality suggests the image not of a standing army—an army at the ready—but of a standing host, one at the ready in welcoming in the guest, the stranger, the passer-by.

Later thinkers, such as Emmanuel Levinas and Jacques Derrida, have offered possible meanings of hospitality. Hospitality, as Derrida explains, “is not simply some region of ethics, let alone . . . the name of a problem in law or politics: it is ethicicity itself, the whole and the principle of ethics.”²⁵⁰ Hospitality demands an extreme type of responsibility, “[r]esponsibility without concerns for reciprocity: I have to be responsible for the Other without concerning myself about the Other’s responsibility toward me.”²⁵¹ Hospitality involves “intentionality, consciousness of . . . attention to speech, welcome of the face.”²⁵² It is a declaration of peace,²⁵³ and it assumes a relation of deference to the other.²⁵⁴ In the realm of political theory, Hannah Arendt has articulated a concept of the political that, in opposition to Schmitt, is *not* defined by enmity and violence but by plurality, freedom, and friendship of equals.²⁵⁵

²⁴⁸ See, e.g., IMMANUEL KANT, *PERPETUAL PEACE* 5 (Lewis White Beck ed., 1957) (“‘Standing Armies Shall in Time Be Totally Abolished’- For they incessantly menace other states by their readiness to appear at all times prepared for war; they incite them to compete with each other in the number of armed men, and there is no limit to this. For this reason, the cost of peace finally becomes more oppressive than that of a short war, and consequently a standing army is itself a cause of offensive war waged in order to relieve the state of this burden. Add to this that to pay men to kill or to be killed seems to entail using them as mere machines and tools in the hand of another (the state), and this is hardly compatible with the rights of mankind in our own person.”).

²⁴⁹ *Id.* at 20.

²⁵⁰ DERRIDA, *ADIEU*, *supra* note 246, at 50. Derrida further distinguishes Levinas’s understanding of hospitality from Kant’s. *Id.* at 87–88 (Kant’s “universal hospitality is here only juridical and political; it grants only the right of temporary sojourn and the right of residence; it concerns only the citizens of States; and, in spite of its institutional character, it is founded on a natural right, the common possession of the round and finite surface of the earth across which man cannot spread ad infinitum . . . Levinas always prefers . . . *peace* now . . . Whereas for Kant the institution of an eternal peace, of a cosmopolitical law, and of universal hospitality, retains a trace of natural hostility, whether present or threatening, real or virtual, for Levinas the contrary would be so: war itself retains the testimonial trace of a pacific welcoming of the face.”).

²⁵¹ *Id.* at 148 n.111 (translating and citing Levinas).

²⁵² *Id.* at 46.

²⁵³ *Id.* at 47.

²⁵⁴ *Id.* at 46.

²⁵⁵ See generally ARENDT, *supra* note 246; see also David W. Bates, *Enemies and*

It is difficult to fully translate the ethical principles of friendship and hospitality into current legal and political theories. Friendship and hospitality appear utopian, naïve, unrealistic, certainly non-Schmittian, and generally inadequate as political assumptions. Nonetheless, I argue that if we were to at least consider letting these principles inform the politics of current decision-making, we might begin a shift away from our current Schmittian politics.²⁵⁶ We could start by considering a politics of friendship and hospitality alongside (if not instead of) Schmittian politics of enmity.

At the very least, friendship and hospitality at the level of nations must involve responsibility towards non-violent individuals who are harmed by hostile actions undertaken by Western governments in the name of the national security of their own citizens. This may be viewed as a non-discrimination principle at the multi-national level. A politics of friendship and hospitality treats equally the lives of all innocent people regardless of national origins or geographical boundaries. Thus, in the context of the current “war on terror,” a politics of friendship and hospitality demands responsibility toward all the innocent civilian victims of the violent “war on terror” declared by the United States. I will later offer applications of this point.

2. *Decisionist Jurisprudence*

As we have seen, what makes one a Decisionist is that “after coming upon a situation of choice where governing norms contradict one another or ‘run out,’ he refuses the enterprise of either repairing the discourse or replacing it with a new discourse that will be more determinate.”²⁵⁷ When legal norms cannot provide meaningful guidance to a legal actor, the Decisionist will not insist that they can.

The crux of Decisionism is the understanding that lawmakers at various levels must act in multiple situations “on the basis of intuition rather than with a ‘warrant.’”²⁵⁸ And this may be difficult at times because “making decisions about what legal rule we want to use . . . —or even which political direction to go in—is hard.”²⁵⁹ It is hard because “[w]e might have to decide

Friends: Arendt on the Imperial Republic at War, in *HISTORY OF EUROPEAN IDEAS* 36, 112, 115 (2010).

²⁵⁶ See also NIR ESIKOVITS, *SYMPATHIZING WITH THE ENEMY: RECONCILIATION, TRANSITIONAL JUSTICE, NEGOTIATION* 1 (2009) (arguing that the path to meaningful peace between historically hostile groups involves “the inculcation of sympathetic attitudes . . . the ability to imaginatively switch places with others and view the world from their perspective”).

²⁵⁷ Kennedy, *supra* note 2, at 1163.

²⁵⁸ *Id.*

²⁵⁹ JANET HALLEY, *SPLIT DECISIONS* 185 (2006).

without knowing that our understanding of the situation is right, without knowing how our decision will play out.”²⁶⁰ In fact, “there is no decision that we could possibly make that will not hurt vast numbers of real, actual people, possibly the very people on whose behalf we think we are acting.”²⁶¹

Derrida brings ethics into our understanding of Humanist Decisionism. “Ethics,” Derrida writes, “enjoins a politics and a law.”²⁶² “Enjoins” here means not the legalistic “prohibits,” but the salutary “prescribes.” Derrida then claims that “this dependence [of politics and law on ethics] and the direction of this conditional derivation are *as irreversible as they are unconditional*.”²⁶³ This relationship is unconditional in the sense that law and politics must always strive to be ethical and should at no point suspend ethics to achieve other goals. And the relationship is irreversible—and this is the important Decisionist insight—in that law and politics do not inform ethics. This is because, for Derrida, ethics is not a universal principle; it can never be codified or broken down into a set of pre-determined rules. Hospitality and friendship cannot generate a “to do” list for legal actors. Thus Derrida continues: “But the political or juridical *content* that is thus assigned remains undetermined, still to be determined beyond knowledge, beyond all presentation, all concepts, all possible intuition, in a singular way, in the speech and the responsibility *taken* by each person in each situation, and on the basis of an analysis that is each time unique . . .”²⁶⁴

There are multiple decision-makers and actors in emergencies—the President, executive officers, judges, legislators, the military, the media, and ordinary citizens—and they all will inevitably have to decide and act at times with no clear legal guidance. *They are nonetheless under ethical constraints that exceed law and legality.* And while this is true at all times and in all areas of law, not only in emergencies, emergencies are extreme situations where the limits of legal norms (as opposed to ethical norms) become apparent.

Take for example the decision-making process around 8 a.m. on the morning of September 11, 2001. It has just been discovered that an unknown number of planes have been hijacked and are up in the air somewhere above U.S. soil. It is unclear where the planes are headed or what the hijacking is about. Unfortunately, it is clear to any decision-maker that *all* possible decisions taken in this dramatic situation would inevitably end the lives of innocents. The gist of the Decisionist approach here is the recognition that intuition-based decisions, not predetermined norms, will govern such

²⁶⁰ *Id.* at 185–86.

²⁶¹ *Id.*

²⁶² DERRIDA, ADIEU, *supra* note 246, at 115.

²⁶³ *Id.* (emphasis added).

²⁶⁴ *Id.*

situations. The *Humanist* Decisionist will nonetheless insist that actors in these situations must be responsible and ethical agents, and that a combination of responsible politics and competence (rather than any legal norm) will ultimately determine the outcome of the event.

To clarify, a politics of hospitality does not mean that decision-makers must sit passively in times of hostile attacks. In a situation when lives need to be saved and harms can be mitigated, violence may be necessary. Hospitality and friendship *do not* mean neglecting the lives of innocent victims of violence. It means that the concern, care, and anxiety that are rightfully extended to the victims of the attacks who happen to be U.S. citizens should also be extended to victims of the counter-attacks inflicted by the U.S. who happen *not to be* U.S. citizens.

Finally, the Humanist Decisionist realizes that when decision-making during a hostile attack—and (perhaps more importantly) *when the actual attack has ended*—are guided by a politics of necessity, enmity, and catastrophe, it does not matter much whether the decisions technically fall within the “rule of law” or within the exception. What matters more is the politics that drive and guide the decision-maker. For example, for Humanist Decisionism it does not matter much whether Guantanamo detentions are justified as a necessary black hole (as they were by the Bush administration), or folded into the rule of law through statutory interpretation (as they were by the Obama administration). To the Humanist Decisionist, what matters most is that a politics of hospitality and friendship can offer a desirable alternative or at least additional considerations in the decision-making process involving national security emergencies.

B. *Normative Implications*

Humanist Decisionism contests the prevailing political assumptions of enmity, necessity, and catastrophe. Among many of its possible implications, here I focus on three. First, Humanist Decisionism challenges the politics of enmity by arguing that the legal distinction between the public and the private enemy should be eliminated. Second, it challenges the politics of necessity and catastrophe by adopting a posture of skepticism regarding the very existence of an emergency. Finally, Humanist Decisionism prescribes the undertaking of measures of friendship and hospitality even at times when simultaneous security measures are deemed necessary.

1. *Undoing the Legal Distinction Between Public and Private Enemies*

The first normative implication of Humanist Decisionism is that we need to rethink the distinction between public and private enemies. As we have

seen, by the fourth decade of the twentieth century, Schmitt and Orwell, from very different perspectives, both identified the figure of the public enemy as the foundational brick of modern politics. Interestingly, as Philip Hamburger recently observed, this distinction between public and private enemies in legal thought dates back at least to the eighteenth century. Emerich de Vattel, one of the founders of international law, distinguished a private enemy from a public enemy, the former being “one who seeks to hurt us, and takes pleasure in the evil that befalls us,” and the latter “forms claims against us, or rejects ours, and maintains his real or pretended rights by force of arms.”²⁶⁵

Humanist Decisionism resists the idea that public enemies deserve special legal treatment. A Humanist Decisionist approach questions the legal distinction between these two types of enmity and suggests that terrorism should be treated just like any other violent crime, under domestic criminal law. Indeed, this was traditionally the practice of the United States government.²⁶⁶ But by 2006, John Bellinger, the Department of State’s Legal Adviser, explained that “our traditional criminal justice system is simply not well-suited to respond to the scale and magnitude of the threat posed by al Qaida.”²⁶⁷ Unfortunately, although the current Administration had originally decided to terminate the usage of the term “enemy combatant,” it has kept in place a similar regime of indeterminate detentions for public enemies—a regime that would obviously not be available under domestic criminal law.

2. Challenging the Existence of an Emergency

Humanist Decisionism prioritizes the question that logically precedes emergency-powers debates: “Is this really an emergency?” On this issue, Humanist Decisionism sides with Legalist approaches that have underscored the importance of a contextual case-by-case factual questioning of the existence of an emergency.²⁶⁸ While many participants in the legal system can and should debate the existence of emergencies, courts in particular should actively engage the issue and *should not defer* to the political branches. In many current and past national security emergencies, courts have either actively agreed with the political branches that an emergency

²⁶⁵ Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1867 (2009) (quoting EMERICH DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE* 321 (G. G. & J. Robinson 1797)).

²⁶⁶ John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 101 AM. J. INT’L L. 185, 198 (2007).

²⁶⁷ *Id.*

²⁶⁸ See, e.g., Dyzenhaus, *supra* note 7.

situation in fact exists,²⁶⁹ or simply left the political declaration of an emergency unchallenged.²⁷⁰

This idea that the Judiciary should question the political branches with regard to the existence of an emergency is not new. Two key historical examples of similar judicial insights are Holmes's opinion in *Chastleton Corp. v. Sinclair* (1924)²⁷¹ and the dissenting opinion of Justice Roberts in *Korematsu* (1944).²⁷² In *Chastleton*, Congress extended the Rent Act of 1919, for seven months and then for two more years, stating that an emergency still existed. The Court stated that the emergency that justified interference with the ordinarily existing private rights in 1919 had come to an end in 1922 and no longer could be applied consistently with the Fifth Amendment. Holmes wrote:

We repeat . . . the respect due to a declaration [of an emergency] [b]y the Legislature so far as it relates to present facts. But even as to them a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . And still more obviously so far as this declaration looks to the future it can be no more than prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.²⁷³

When a court encounters a legislative declaration of an emergency, it must evaluate it, and cannot simply shut its eyes when it concludes it to be mistaken.

Interestingly, Holmes's skepticism about emergencies was relied on in

²⁶⁹ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629 (1952) ("There can be no doubt that the emergency which caused the President to seize these steel plants was one that bore heavily on the country."); *Korematsu v. United States*, 323 U.S. 214, 219 (1944) ("The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin.").

²⁷⁰ See, e.g., *Clancy v. Office of Foreign Assets Control of U.S. Dep't of Treasury*, 559 F.3d 595, 596 (7th Cir. 2009) ("Having declared a national emergency to deal with the threat of Iraq in 1990, President George H.W. Bush imposed economic sanctions prohibiting unauthorized travel to Iraq and authorized the Treasury Department's Office of Foreign Assets Control ('OFAC') to promulgate regulations in accordance with those executive orders."); *United States v. Dhafir*, 461 F.3d 211, 214 (2d Cir. 2006) ("Following the Iraqi invasion of Kuwait in August, 1990, President George H.W. Bush issued four emergency Executive Orders declaring a national emergency . . .").

²⁷¹ 264 U.S. 543, 546 (1924).

²⁷² 323 U.S. 214, 225 (1944) (Roberts, J., dissenting).

²⁷³ *Chastleton*, 264 U.S. at 547-48 (citations omitted).

Justice Roberts' dissenting opinion in *Korematsu*. Roberts noted that the majority understood the Civilian Exclusion Order that directed that all persons of Japanese ancestry be excluded from a certain area to be "a temporary expedient made necessary by a sudden emergency."²⁷⁴ Roberts relied on *Chastleton*, writing:

My agreement would depend on the definition and application of the terms "temporary" and "emergency." No pronouncement of the commanding officer can, in my view, preclude judicial inquiry and determination whether an emergency ever existed and whether, if so, it remained, at the date of the restraint out of which the litigation arose.²⁷⁵

A more recent example of such judicial engagement with the question of the existence of an emergency is the *Belmarsh* (2004) decision, also known as "Britain's Guantanamo Bay."²⁷⁶ *Belmarsh* involved a post-9/11 "Anti-Terrorism Act" enacted by the British Parliament in 2001 that granted the government the power to indefinitely detain non-nationals who had been determined to be a security risk, but for various reasons could not be deported.²⁷⁷ The detainees held in indefinite detention in Belmarsh prison challenged the statutory provision that authorized their detention, claiming that there was no public emergency threatening the "life of the nation." The House of Lords held by a majority that, while the detention was legal under the Anti-Terrorism Act, this Act was incompatible with the articles of the European Convention on Human Rights because it discriminated between nationals and non-nationals.²⁷⁸

Lord Hoffman offered a much more critical view of the Anti-Terrorism Act. He found the whole Act incompatible with the United Kingdom's constitution and its commitment to human rights. His view was that the ultimate test—that there is a "threat to the life of the nation"—was not met. He wrote, "the question is whether such a [terrorist threat posed by fundamentalist Islamic terror groups] is a threat to the life of the nation,"²⁷⁹ and concluded that "they do not threaten the life of the nation,"²⁸⁰ and that "[w]hether we would survive Hitler hung in the balance, but there is no doubt

²⁷⁴ *Korematsu*, 323 U.S. at 231.

²⁷⁵ *Id.* at 231 n.8.

²⁷⁶ See Denise Winterman, *Belmarsh – Britain's Guantanamo Bay?* BBC NEWS (Oct. 6, 2004, 10:01 PM), http://news.bbc.co.uk/go/pr/ft/-/2/hi/uk_news/magazine/3714864.stm.

²⁷⁷ *A v. Sec'y of State for the Home Dep't*, [2005] UKHL 71, [2005] 2 A.C. 68 (appeal taken from Eng.).

²⁷⁸ *Id.* at 127.

²⁷⁹ *Id.* at 131.

²⁸⁰ *Id.* at 132.

that we shall survive Al-Qaeda.”²⁸¹ This judicial posture reflects the humanist concern with the proper use of the term “emergency.”

A similar challenge to the existence of an emergency appears in the Ninth Circuit’s decision in *Natural Resources v. Winter*.²⁸² In *Winter*, environmental groups sued the Navy on the grounds that the Navy’s training exercises violated the National Environmental Policy Act of 1969 (NEPA) and other federal laws. The suit was based on the Navy’s failure to submit an environmental impact statement as required by NEPA.²⁸³ Plaintiffs argued that the Navy’s use of active sonar while training in the waters of southern California would harm many species of marine mammals, including dolphins, whales, and sea lions.²⁸⁴ The Navy argued in turn that “emergency circumstances” prevented its normal compliance with NEPA.²⁸⁵ The Ninth Circuit held that there was a serious question regarding whether the Council on Environmental Quality’s (CEQ) interpretation of the “emergency circumstances” regulation was lawful.²⁸⁶ The court questioned whether there was a true “emergency” here, given that the Navy had been on notice of its obligation to comply with NEPA.²⁸⁷

However, the Supreme Court reversed.²⁸⁸ The decision, written by Chief Justice Roberts, reasserted the political assumptions of necessity and catastrophe. The decision begins with the observation that “[t]o be prepared for war is one of the most effectual means of preserving peace.”²⁸⁹ Roberts based the reversal on the Decisionist premise that courts should give “deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.”²⁹⁰

Humanist Decisionism supports a rigorous, Humanist judicial scrutiny of all legislative and executive declarations of emergencies. This scrutiny is critical with regard to prevalent articulations of politics as a realm of necessity, catastrophe, and enmity. The humanist judge soberly examines

²⁸¹ *Id.*

²⁸² *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658 (9th Cir. 2008), *rev’d*, 129 S. Ct. 365 (2008).

²⁸³ *Id.* at 660–61.

²⁸⁴ *Id.* at 665–66.

²⁸⁵ *Id.* at 681.

²⁸⁶ *Id.* at 686.

²⁸⁷ *Id.* at 683.

²⁸⁸ *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 365 (2008).

²⁸⁹ *Id.* at 370 (quoting George Washington First Annual Address (Jan. 8, 1790), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 65 (James D. Richardson ed., 1896)).

²⁹⁰ *Id.* at 367 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)).

every situation with a genuine openness to the possibility and desirability of an alternative set of political attitudes.

3. *Balancing Hostility with Hospitality*

At the national level, acts of friendship and hospitality can balance acts of hostility. Here I will briefly discuss two contemporary situations in which such balancing is appealing; the first deals with policy, the second with legal and political rhetoric. First, the government can implement policies of generosity specifically targeting groups or communities inadvertently affected by acts of hostility. Second, political and legal actors can effectively interrupt hostile public perceptions of “the enemy” by actively choosing rhetoric of friendship and hospitality over rhetoric of rights.

First, even if the safety of the public at times necessitates security measures, I argue that these measures should be—and to some extent already are—balanced with policies of friendship and hospitality. This balance is desirable because (1) more friendliness may decrease the overall level of violence (a utilitarian justification); and (2) cultivating social and governmental attitudes that are less driven by fear and self-preservation and more driven by responsibility and social obligation may generate more meaningful concepts of citizenship and community (an ethical justification).

An example of such balancing involves the treatment of civilian refugees displaced as a consequence of the U.S. struggles against terrorism. Financial aid to refugees and to countries who host them is one example of a desirable friendly policy.²⁹¹ Indeed, the current Administration has recently announced a financial grant of one million dollars to Pakistan as a host of a large number of Afghani refugees.²⁹² More robust acts of friendship and hospitality might include welcoming of such refugees into the United States by granting asylum or special immigration visas.²⁹³

²⁹¹ In 2009 alone, about 26,800 Afghans requested refuge. See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, ASYLUM LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES 2009 (Mar. 2010), <http://www.unhcr.org/4ba7341a9.html>.

²⁹² *U.S. Pledges Additional Funding for Displaced Afghans in Pakistan*, U.S. DEP’T OF STATE (Oct. 14, 2010), <http://www.america.gov/st/texttransenglish/2010/October/20101015123627su0.5285761.html> (“[T]he U.S. Pledges Additional \$1 Million to Help Displaced Afghans in Pakistan and Their Host Communities . . . The announcement of the U.S. contribution is in addition to the \$75 million in other 2010 assistance this year to Afghan refugees—both those remaining in Pakistan and Iran and those returning to Afghanistan. It reflects U.S. support for policies of tolerance by the government of Pakistan toward Afghan refugees, and for cooperation between the Afghan refugee communities in Pakistan and the Pakistani communities that neighbor them.”).

²⁹³ For a narrowly tailored example of such a special immigration visa, see The Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1244, 122 Stat.

Second, a persistent social amnesia regarding the identity and nature of the enemy in the current “war on terror” has resulted in a need for occasional announcements to remind the American public that “[a]s Americans we are not—and will never be—at war with Islam.”²⁹⁴ Most recently, this forgetfulness generated uproar around a plan to build a Muslim community center in lower Manhattan.²⁹⁵ The dilemma here is how best to articulate the distinction between a small group of criminals and a respectable religious faith shared by millions. Is there something in current rhetoric about Islam that incites this forgetfulness?

The primary justification for the claim that we are not “at war with Islam” is religious freedom. For example, Michael Bloomberg, the mayor of New York City, has defended the plan to build the Mosque in downtown Manhattan on these grounds: “[W]e are Americans, each with an equal right to worship and pray where we choose By affirming that basic idea, we will honor America’s values.”²⁹⁶ Likewise, President Obama said: “This country stands for the proposition that all men and women are created equal, that they have certain inalienable rights . . . [a]nd what that means is that if you could build a church on a site, you could build a synagogue on a site, if you could build a Hindu temple on a site, then you should be able to build a mosque on the site.”²⁹⁷

The rights-based argument is correct. Muslims enjoy the constitutional right under the First Amendment to freely practice their faith just as Christians, Hindus, and Jews do. But there is another—much more powerful—form of rhetoric in the President’s recent addresses to Islam that may have more purchase: direct declarations of hospitality and friendship. “We’ve got millions of Muslim Americans, our fellow citizens, in this country,” President Obama said in response to the mosque in lower

3 (2008) (“Special Immigrant Status for Certain Iraqis”: authorizing 5,000 special immigrant visas annually for fiscal years 2008–2012, and creating a new category of special immigrant visa for Iraqi nationals who have provided faithful and valuable service to the U.S. Government, while employed by or on behalf of the U.S. government in Iraq, at least one year after March 20, 2003, and who have experienced or are experiencing an ongoing serious threat as a consequence of that employment).

²⁹⁴ Anne Barnard & Manny Fernandez, *On Anniversary of Sept. 11, Rifts Amid Mourning*, N.Y. TIMES, Sept. 12, 2010, at A1 (quoting President Obama).

²⁹⁵ Laurie Goodstein, *Around Country, Mosque Projects Meet Opposition*, N.Y. TIMES, Aug. 8, 2010, at A1 (“While a high-profile battle rages over a mosque near ground zero in Manhattan, heated confrontations have also broken out in communities across the country where mosques are proposed for far less hallowed locations.”).

²⁹⁶ Michael Bloomberg, *A National Conversation: NYC’s Religious Promise*, N.Y. POST, Aug. 24, 2010, at 23.

²⁹⁷ Helene Cooper, *Obama Tries to Calm Religious Tensions in Call for Religious Tolerance*, N.Y. TIMES, Sept. 11, 2010, at A1.

Manhattan.²⁹⁸ “They’re going to school with our kids. *They’re our neighbors. They’re our friends.* They’re our co-workers. And when we start acting as if their religion is somehow offensive, what are we saying to them?”²⁹⁹

“I am grateful for your hospitality and the hospitality of the people of Egypt”—thus begins President Obama’s address to the Muslim world in Cairo in June of 2009.³⁰⁰ Throughout this speech the President reaches out to Islam with rhetoric of gratitude, hospitality, and peace. He urges Muslims and non-Muslims to “have the courage to make a new beginning, keeping in mind what has been written.”³⁰¹ And what *has* been written? Obama then quotes the Talmud—“The whole of the Torah is for the purpose of promoting peace”—³⁰² and the New Testament—“Blessed are the peacemakers, for they shall be called sons of God.”³⁰³ Interestingly, though, he first quotes a passage from the Koran that, by contrast, does not mention peace: “O mankind! We have created you male and female and we have made you into nations and tribes *so that you may know one another.*”³⁰⁴ Here, mankind has been divided into nations not for war or peace or prosperity or progress, but for one purpose: “so that you may know one another.” Knowledge of the other person and nation is the sole purpose of the separation of mankind into nations—says the Koran text that closes Obama’s speech. This was our definition of hospitality: conscious listening to the other, welcoming the face of the other, and occupying a relation of deference to the other. Perhaps Obama’s concluding words may help us understand what deference to the other might mean in this context—“It’s a faith in other people, and it’s what brought me here today.”³⁰⁵ This rhetoric of friendship, hospitality, and responsibility towards Islam is different from the strictly legalistic rhetoric of religious liberty pursued elsewhere by the President and by others. Such rhetoric is important, especially in times of hostilities, because it dares to imagine a political and legal alternative to fear, vulnerability, and enmity.

²⁹⁸ *Id.*

²⁹⁹ *Id.* (emphasis added).

³⁰⁰ *Barack Obama’s Cairo Speech*, THE GUARDIAN, June 4, 2009, <http://www.guardian.co.uk/world/2009/jun/04/barack-obama-keynote-speech-egypt>.

³⁰¹ *Id.*

³⁰² *Id.* (quoting *Gittin* 59b).

³⁰³ *Id.* (quoting *Matthew* 5:9).

³⁰⁴ *Id.* (emphasis added).

³⁰⁵ *Id.*

VII. CONCLUSION

Vice President Dick Cheney declared shortly after September 11, 2001, that we should consider the current period not an emergency at all, but “the new normalcy.”³⁰⁶ Necessity, enmity, and catastrophe have indeed become the normal politics shared by many Legalists and Decisionists in emergency-powers debates. Legalist and Decisionist disagreements often turn on the balance of powers and the proper role of law in the “war on terror.” Should the primary tools for fighting terror be norms or decisions? Legalists have argued for the former and Decisionists for the latter. Legalists have argued that the rule of law must survive at all times. Decisionists have insisted that the key to the nation’s survival is a strong, decisive executive branch that is sometimes unbound by legal norms. But despite these disagreements, many versions of Decisionism and Legalism have conceded that the state of emergency has indeed become “the new normalcy.” This Article argues that we should develop an alternative vision of the human and the state as they exist in times of crisis.

³⁰⁶ Lynn Ludlow, *Paper Tigers: Normalcy? No, Nay, Never*, S.F. CHRON., Nov. 4, 2001, at C2; see also Bob Woodward, *CIA Told To Do ‘Whatever Necessary’ to Kill Bin Laden*, WASH. POST, Oct. 21, 2001, at A1.